SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1951.

669 31

Miscellaneous Docket No. 300.

UNITED STATES OF AMERICA ex rel. JAMES SMITH,
Petitioner,

v.

DR. FREDERICK S. BALDI, Superintendent,
Philadelphia County Prison.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AND AFFIDAVIT OF COUNSEL.

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OCTOBER TERM, 1951

Miscellaneous Docket No. 300.

UNITED STATES OF AMERICA EX REL.
JAMES SMITH,
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v.

DR. FREDERICK S. BALDI, SUPERINTENDENT,
PHILADELPHIA COUNTY PRISON.

PETTTION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James Smith, respectfully represents:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

On February 18, 1948, petitioner was indicted for murder in the Court of Oyer and Terminer, Philadelphia County, under No. 384, February Term, 1948, and was ultimately sentenced to death in the electric chair on the theory that he committed a murder in the attempt to perpetrate a robbery.

After his sentence on February 4, 1949, petitioner appealed to the Supreme Court of Pennsylvania, which affirmed the sentence of death. *Commonwealth v. Smith*, 362 Pa. 222, 66 A. 2d 764.

At that time, he did not petition this Court for a writ of certiorari to review the affirmance of his sentence. An application for executive clemency was made to the Pennsylvania Board of Pardons which was rejected September 21, 1949.

Two days later, petitioner filed his petition for writ of habeas corpus with one of the judges of the United States District Court for the Eastern District of Pennsylvania. That judge directed oral argument the next day upon notice to the prosecuting attorney. After oral argument, the judge issued the writ on September 24, 1949, but the petitioner meanwhile was being transported to another part of the state for execution and at the time the writ issued was beyond the territorial limits of the Eastern District of Pennsylvania.

The full court of five judges assembled at the request of the judge who issued the writ and petitioner was directed to orally argue three questions: (a) territorial jurisdiction; (b) exhaustion of state remedies; (c) sufficiency of the petition. After oral argument the court directed that testimony be taken before the judge who had issued the writ. Such testimony was taken.

Thereafter a majority of the court dismissed the petition on the sole ground that the court lacked territorial jurisdiction. One of the majority also expressed the view that state remedies had not been exhausted. The judge who had issued the writ and heard the testimony dissented and held that the court did have jurisdiction, that under the special circumstances of the case there had been sufficient exhaustion of state remedies, and that he was convinced by the testimony taken before him that petitioner's federal constitutional right to procedural due process had been violated.

No findings of fact were made by the court except those stated in the opinion of the judge who heard the testimony. The three separate opinions are reported at *Commonwealth ex rel. Smith v. Warden, Philadelphia County Prison, et al.*,

87 F. Supp. 339. The action of the District Court was affirmed on appeal to the Court of Appeals at 181 F. 2d 847, on the sole ground that at the time the writ issued the District Court was without territorial jurisdiction.

Since the Commonwealth contended in these proceedings that petitioner had not exhausted "state" remedies, he filed on November 21, 1949, an original petition in the State Supreme Court. The grounds were broader than those stated in the original petition to the United States District Court. The State Supreme Court, upon examination of the petition and an oral statement which counsel was directed to make in open court, found that on its face the petition recited facts which, if true, warranted relief and on November 23, 1949, granted a rule to show cause why a writ of habeas corpus should not issue (Supplemental Appendix for Appellant, p. 1).

The State Supreme Court, however, refused to afford petitioner an opportunity to prove his allegations. In some unofficial way, still unknown to counsel for petitioner, the opinion writer got hold of a copy of the testimony previously taken in the United States District Court (see Supplemental Appendix for Appellant, pp. 54-55).

The State Supreme Court made no findings of fact, nor did it refer the case to any Pennsylvania tribunal to hear evidence and to make findings of fact as requested by petitioner, but instead, the opinion writer stated conclusions as having been drawn from that testimony which were not only contrary to the petition before the court but also to the testimony of petitioner's witnesses and the inferences drawn by the United States District Court Judge who heard those witnesses. The State Supreme Court simply dismissed the petition in a long opinion without really adjudicating it. *See Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 71 A. 2d 107. This action was called to the attention of this Court upon petition for writ of certiorari at No. 818, October Term, 1949. This Court refused certiorari. 340 U. S. 812.

Petitioner, who was then back in the Philadelphia County Prison, within the territorial jurisdiction of the Eastern District of Pennsylvania, submitted a new petition to the District Court alleging deprivation of rights under the Fourteenth Amendment on substantially the same grounds as previously urged in the Supreme Court of Pennsylvania. Upon inspection of the petition, the same judge of the District Court who had previously heard the testimony determined that it showed a prima facie case and granted a rule to show cause why a writ of habeas corpus should not be granted and *sua sponte* the judges of the District Court (now seven in number) assembled the full court. A majority of the court ultimately refused to issue the writ or to permit petitioner to prove the truth of his averments, but by this time petitioner was gaining strength. The Opinion of the Court and the Dissenting Opinion (4 to 3) are reported at 96 F. Supp. 100. By what it called "a valid exercise of sound judicial discretion" the majority dismissed the petition without hearing evidence. The minority (which included the judge who had granted the rule) dissented on the ground that a hearing should be held.

Upon appeal the seven judges of the Court of Appeals for the Third Circuit *sua sponte* assembled the full court. Again the petitioner almost won. The Opinion of the Court affirming the judgment and the Dissenting Opinion (4 to 3) accompany this petition. The Court of Appeals stayed the execution of petitioner pending disposition of this petition.

The majority opinion of four judges of the Court of Appeals holds that state remedies having been exhausted, the District Court had jurisdiction, that it did not have the discretion it claimed but that the petition did not demonstrate a deprivation of federal constitutional rights and hence its decision should be affirmed. The Dissenting Opinion of the three judges agree on jurisdiction and exhaustion of state remedies but state unequivocally that the Petition and records of the case make a substantial showing that Pennsylvania denied petitioner procedural due process un-

der the Fourteenth Amendment on six separate grounds and that there ought to be a hearing and finding of facts.

Petitioner has transmitted to this Court for its consideration the papers which were considered by the Court of Appeals (a) original printed record on appeal to the Supreme Court of Pennsylvania; (b) Appendix to Brief for Appellant; (c) Supplemental Appendix to Brief for Appellant; (d) Notes of Testimony taken before the judge of the United States District Court on original Habeas Corpus; (e) Appendix to Appellee's Brief.

Petitioner believes it would be helpful if instead of a general statement of facts he were to present each issue in the light of its own facts.

A. Petitioner Was Arraigned in a Capital Case Without Counsel. He Pleaded "Not Guilty" But Was Harmed Anyway Because He Thereby Lost His Only Chance to Have His Mental Competency Tried in Limine by a Jury.[1]

Petitioner is a young man with a long and well-authenticated history of insanity, including an adjudication of mental incompetency to be tried by a New York Criminal Court. Shortly after midnight on January 15, 1948, while riding as a passenger in the back seat of a slowly moving taxicab, he killed the unoffending taxicab driver by shooting him in the back of the head. Petitioner then jumped over to the front seat to bring the taxicab to a stop, dropped his pistol on the seat, got out, was apprehended at the scene and turned over to the police. The police say that although he made no attempt to take the driver's money, petitioner admitted that such had been his purpose.

The first point in the proceedings wherein Petitioner bases his claim of denial of due process was his arraignment. Petitioner, who was indigent, had been confined in

1. This point is treated in the Majority Opinion p. 6, et seq.; 192 F. 2d at 545; and in the Dissenting Opinion p. 22, et seq.; 192 F. 2d 553, et seq. Petitioner briefs the point post p. 30 et seq.

the Philadelphia County Prison after his arrest and had not retained counsel. However, on the evening of February 24, 1948, six days after indictment, a relative of Petitioner retained Herbert S. Levin, Esquire, of the Philadelphia Bar, to represent Petitioner. On the following day, without notice to Mr. Levin (who had not yet had time to enter a formal appearance) Petitioner was brought to the bar of the court and arraigned. Mr. Levin was not present.

Even though the charge was a capital one, no attempt was made to ascertain if defendant was represented by counsel. An instant before arraignment, the court directed Joseph Alessandroni, Esquire, of the Philadelphia Bar, who was in the courtroom on other business, to stand beside Petitioner. Mr. Alessandroni was not directed to do so as appointed counsel. He had nothing to do with the case either before or after the arraignment. Mr. Alessandroni did not know what Petitioner was charged with except that the offense was Murder. Mr. Alessandroni did not know in what circumstances Petitioner was alleged to have committed murder. Mr. Alessandroni had never seen Petitioner before the arraignment and never saw him thereafter. Mr. Alessandroni had no knowledge as to Petitioner's mental capacity or lack of mental capacity to be arraigned. Mr. Alessandroni was afforded no opportunity by the court to consult with Petitioner. The only thing Mr. Alessandroni said to Petitioner was that he was *not* Petitioner's counsel and that Petitioner should plead Not Guilty and prompted Petitioner to make the old common law response that he elected to be tried by "God and my country." Mr. Alessandroni did not explain the nature of the proceedings to Petitioner. (All of the above averments appear in paragraph 3 of the Petition. See Supplemental Appendix for Appellant, pp. 14-15.)

At his arraignment the judge had *power* to direct a separate *jury trial* on the issue of his mental competency to be tried on the general issue. Thereafter not only dis-

cretion to grant such jury trial was lost but power also. Other *non-jury* proceedings may have been open to him *in limine* but power in any court to grant him a jury trial *in limine* was lost. Petitioner tried the other ways which were thought to be open to him but was denied them also. The court held itself to be powerless because the warden of the prison refused to join as a party petitioner. *His mental competency to stand trial has never been determined by any court legally organized and competent to do so.*

B. Under the Circumstances of This Case There Could Be No Effective Assistance of Counsel Without Adding Thereto the Right to Employ Psychiatric Assistance at the Expense of the Commonwealth.[2]

The petition for habeas corpus in this case averred (Supplemental Appendix for Appellant, p. 9, par. 31) "It is averred that Relator's appointed counsel were deprived of and denied the means of effectively aiding Relator, both pre-trial and during the trial or hearing, in that they were refused, and unable to obtain, psychiatric aid to determine Relator's sanity, or to assist them in the cross-examination of the court appointed psychiatrist; that this is a denial of due process, in contravention of the guarantees to which Relator was entitled under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution."

The petition further recited (id. p. 10, par. 34) "It is averred that the failure to furnish Relator or his court-appointed counsel with, and the denial to them of, psychiatric examination of Relator and psychiatric advice, pre-trial and during the trial or hearing, violates the rights of Relator guaranteed him by Amendments 5, 6 and 14 of the Constitution of the United States, the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution."

2. This point is treated in the Majority Opinion p. 10, et seq.; 192 F. 2d 546; and in the Dissenting Opinion p. 34, et seq.; 192 F.2d 559. Petitioner briefs the point post p. 44 et seq.

It clearly appears also from the pre-trial petition filed by Mr. Levin as private counsel on petitioner's behalf (Supplemental Appendix to Brief for Appellant, 62a-64a) that after setting forth the history of petitioner's mental disease, including the diagnosis of psychosis, inability to defend and commitment to the Brooklyn State Hospital, counsel specifically asked for the appointment of a commission to inquire into and to report upon the facts as to mental capacity. Furthermore, in his petition to withdraw as private counsel, the same type of mental illness was recited and also the need of preparing the defense with the aid of psychiatric testimony (see id. par. 11, 68a, 71a).

The majority of the court below assumed the *untruth* of these averments of the petition without giving petitioner an opportunity to prove them. Also, the rather bewildering opinion of the State Supreme Court (Supplemental Appendix for Appellant, p. 39) says that there was no request for a "sanity hearing" but the opinion writer had himself already pointed out that counsel requested one (p. 33) and the petitioner requested one (p. 34).

The failure to afford medical aid in the circumstances of this case [3] rendered ineffective the requisite "assistance" of counsel. Here, there could be no effective assistance without the help of a man capable of understanding mental illness. Appointment of a psychiatrist after guilty plea to inform the court as to penalty cured nothing. The psychiatrist so appointed did not inquire into the data relevant to decision and his own presently incurable psychosis casts grave doubt as to the competency of the data supplied by him upon which the court acted. (See affidavit of Counsel post, p. 21.)

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3. A full medical history appears in the dissenting opinion of the court below pp. 38-42; 192 F. 2d at 561-563.

C. The Plea of Guilty Was Void. At a Hearing on Such Plea the Court Is Without Authority to Adjudicate Mental Competency.[4]

Petitioner, under the circumstances noted above, having not had his sanity determined *in limine* by court, jury or commission, having no money to engage medical expert opinion to testify whether he was insane either under the rule applicable to responsibility for crime as well as competency to be tried, entered a bastard type of guilty plea on September 21, 1948. The Court, prosecutor and defense counsel, with full knowledge that (a) petitioner had previously been adjudged mentally incompetent; (b) that he had been denied psychiatric examination or assistance; (c) that the formal petition for a commission in lunacy had been denied; (d) that no Pennsylvania court had passed on his mental capacity, joined in having such a guilty plea entered.

It was agreed between the court, prosecutor and counsel for defendant that the guilty plea was an "expedient" to provide breathing space for getting the records as to petitioner's mental incompetency from New York. The Commonwealth so characterized it in its original brief. Only the Commonwealth was to produce its evidence with the defense to be heard later. But, having accepted the plea, the Court held petitioner bound by it.

Petitioner avers that the Court was without power either under the common law or statute to receive such plea under such circumstances. The agreement of a defendant cannot supply the lack of fundamental power of the court which is inherent in such a situation.

The State Supreme Court held that the guilty plea relieved the trial court of the necessity of adjudicating mental competency. The majority of the court below disagrees with the State Supreme Court and concedes that petitioner

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4. This point is treated in the Majority Opinion p. 9, 192 F. 2d 546; and in the Dissenting Opinion p. 24, et seq.; 192 F. 2d 554. Petitioner briefs the point post p. 48 et seq.

was as a matter of federal right entitled to have his mental competency determined prior to judgment but then holds that the sentencing court did adjudicate the point. It could not legally do so and it did not do so.

D. The Trial Court Adjudicated the Degree of Petitioner's Crime to be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question.[5]

The guilty plea, even if valid, constituted a plea to second degree murder. It became thereby the duty of three judges to hear the evidence, resolve any conflicts, find the true facts and decide the appropriate degree of the offense. The burden of proving first degree murder to the satisfaction of the judges beyond a reasonable doubt still lay on the prosecution. If the judges, after hearing all the evidence, were satisfied that it was murder in the first degree, they could impose in their discretion the penalty of life imprisonment or death by electrocution. If not so satisfied a judgment no higher than second degree could be entered.

The record of this case and the true facts demonstrate beyond any doubt that although the trial court was required to hear both sides of the case before coming to any conclusion as to the degree of petitioner's guilt of murder, it determined his guilt on September 21, 1948, as murder of the first degree not only before hearing any evidence as to his mental competency, but *before hearing even his own testimony or any other factual evidence on his behalf.* This is demonstrated (a) by the docket entries (R. 2a); (b) by the original indictment (photostatic copy attached to end of opinions of court below); (c) by the original Record on appeal in the Supreme Court (R 76a); and (d) by the Opinion of the Supreme Court affirming the judgment on the main case (362 Pa. 222, 66 A. 2d 764).

5. This point is treated in the Majority Opinion p. 12, 192 F. 2d 547; and in the Minority Opinion p. 27, 192 F. 2d at 555. Petitioner briefs the point post p. 51 et seq.

This premature action of the trial court not only violated due process; it violated the agreement that constituted the very basis upon which the guilty plea was entered. Since the judgment of first degree murder was rendered by a court which at that time was without power to render it, it is void.

E. The Trial Court Not Only Was Without Jurisdiction on Guilty Plea to Adjudicate Mental Competency to Plead But Never Heard or Acted on Relevant Evidence on This Issue. The M'Naghten Formula Has Nothing to Do With This Issue. Besides, That Formula Is Now Outmoded and Is Not a Sufficient Basis Upon Which Even to Decide the Entirely Separate Question of Responsibility for Crime.[6]

The sentencing court adjudicated petitioner's guilt to be murder of the first degree and never did receive relevant evidence on the issue of his mental competency to plead, or to be tried, or sentenced. The Court received no evidence to show whether petitioner was mentally competent *to appreciate his peril or cooperate in his defense* either on February 25, 1948, when he pleaded Not Guilty, nor on September 21, 1948, when he pleaded Guilty. Instead the court proceeded to sentence petitioner to death by applying the principle of the M'Naghten formula which *never did have any legal relevancy to the issue of mental competency to be tried.* The psychiatrist testified that he "believed" petitioner knew the difference between *right and wrong at the time of his examination* on November 4, 1948, and *at the time of the killing* on January 15, 1948 (Record in Supreme Court, p. 164a). He was never asked the relevant questions by anybody. The Court could not and did not adjudicate that burning pivotal issue.

In the light of accepted modern medical and scientific learning, the M'Naghten rule is outmoded and it is a denial

6. This point is treated in the Minority Opinion p. 37, et seq., 192 F. 2d 560. Petitioner briefs the point post p. 60 et seq.

of due process of law to permit it to be of controlling legal relevancy even in adjudging mental responsibility for crime. There is no justification at all for an attempt at this late date to set it up as a test of mental capacity to plead or be tried.

F. The Supreme Court of Pennsylvania Not Only Failed to Redress Violation of Petitioner's Constitutional Rights by the Trial Court But Itself Denied Such Rights by Refusing to Hear and Adjudicate the Petition for Writ of Habeas Corpus.[7]

Since the Supreme Court of Pennsylvania, by issuing the rule to show cause agreed that the petition presented a prima facie case, it was the duty of that court to hear and adjudicate the case. It could do this only by accepting the averments of the petition to be true or by giving petitioner an opportunity to prove them to be true. Instead, it assumed some of the pivotal averments to be untrue. The opinion writer got hold of the testimony taken before the federal court (which later held itself to be without territorial jurisdiction) and used such of the evidence as he thought comported with the court's decision, without warning or notice to petitioner that he would do so, and without giving petitioner an opportunity to prove his case before any Pennsylvania tribunal.

No findings of fact were made by the Supreme Court. Under the circumstances the Supreme Court of Pennsylvania adjudicated nothing. In any event it is the duty of a federal court, in a case properly before it on habeas corpus, to come to its independent judgment as to whether federal rights have been violated.

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7. This point is treated in the Majority Opinion p. 14, 192 F. 2d at 548; and in the Dissenting Opinion p. 21 et seq., 192 F. 2d 552. Petitioner briefs the point post p. 63 et seq.

G. The District Could Should Have Heard the Petition.[8]

Petitioner had exhausted his state remedies. His petition made a substantial prima facie showing that the State of Pennsylvania had violated his constitutional right to due process under the Fourteenth Amendment. The judge to whom the petition was addressed agreed that this was so and issued a rule to show cause why a writ of habeas corpus should not be granted. Then the judges of the District Court assembled *sua sponte* and heard oral argument and received briefs.

The majority overruled the judge who had issued the rule to show cause and refused to permit petitioner to prove the truth of his averments. Petitioner asserts that the judges of the District Court were without power to act as they did en banc and in any event, the denial to him of an opportunity to prove his averments constituted a violation of the due process clause of the Fifth Amendment.

II. BASIS OF JURISDICTION.

The jurisdiction of this Court is sustained by Section 1254(1) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1254(1).

The decision sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit filed on October 26, 1951, affirming the dismissal by the United States District Court for the Eastern District of Pennsylvania of a Petition for a writ of habeas corpus alleging deprivation by the State of Pennsylvania of petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States.

Petitioner has exhausted all "state remedies." *Conviction*—Commonwealth v. Smith, Philadelphia, Oyer and

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8. This point is treated in the Majority Opinion pp. 2-5, 192 F. 2d 543-544; and in the Dissenting Opinion p. 37, 192 F. 2d 560. Petitioner briefs the point post p. 68 et seq.

Terminer, opinion filed March 4, 1949 (unreported), aff'd 362 Pa. 222, 66 A. 2d 764 (1949). *Habeas Corpus*—Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A. 2d 107 (1950), cert. den. 340 U. S. 812 (1950). This point is conceded by the Commonwealth and all judges of the two federal courts below.

III. QUESTIONS PRESENTED.

1. Where Petitioner had a long history of mental disease including medical discharge from the Army, treatment in mental hospitals and an adjudication of insanity, was it a denial of procedural due process of law under the Fourteenth Amendment to arraign him on a capital charge in the absence of his family, friends and counsel where he thereby lost his only chance under State law of having his mental incapacity determined *in limine* by a *jury* from the failure to make the need for such determination known to the court "upon arraignment"?

2. Where almost the whole of such a man's defense is insanity, and he is indigent and thereby unable to procure a psychiatrist to help in the presentation of his defense, is it a denial of due process of law to refuse to permit petitioner to hire a psychiatrist at public expense?

3. On a guilty plea admitting second degree murder only was it a violation of procedural due process for the trial court, having heard only the testimony of the prosecution, to adjudge petitioner's guilt to be murder of the first degree and to refuse thereafter to consider or indeed hear any testimony (whether medical or not) except on the issue of whether the penalty should be life imprisonment or death?

4. Consistent with the requirements of procedural due process and in the absence of state statutory authority

does a court composed of three judges have power to decide after acceptance of guilty plea the issue of mental capacity of petitioner to so plead?

5. Did the sentencing court violate procedural due process in refusing to dispose *in limine* of the issue of mental capacity to be tried and then dispose of it after guilty plea by applying the legally *irrevelant* formula of ability to distinguish right from wrong and without hearing any evidence, expert or otherwise, on the legally *relevant* question of capacity of defendant to appreciate his peril and to cooperate in his defense?

6. Was it a denial of procedural due process of law for the Supreme Court of Pennsylvania to refuse to permit Petitioner to prove by testimony the facts alleged in a procedurally proper petition for habeas corpus which prima facie showed deprivation of procedural due process under the Fourteenth Amendment by a lower Pennsylvania court?

7. Where a single judge of the District Court of the United States has examined a petition for writ of habeas corpus alleging violation of procedural due process under the Fourteenth Amendment by state officers, has the District Court jurisdiction to sit en banc and dismiss the petition by vote of four judges over the dissent of three judges including the judge who granted the rule?

8. Was the District Court or a judge thereof obliged, by the Fifth Amendment and the averments of the petition to hear and determine the facts of this case?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The present case presents many questions of fundamental importance in the administration of constitutional law, particularly with regard to deprivation by state authority of life and liberty contrary to the requirements of procedural due process under the Fourteenth Amendment.

1. The majority of the court below posed the following problem:

> "Has a man a constitutional right not to be tried or executed if 'insane' or not to meet the penalty for a crime committed while in that condition? Is the imposition of criminal responsibility in such case, in the words of Mr. Justice Black, so 'offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' that it violates substantive due process?"

To that grave problem the majority specifically answered "We do not know."

The minority judges of the court below say that the answer is an unequivocal "Yes" to both questions. So do the judges of the Eighth Circuit in *Ashley v. Pescor*, 147 F. 2d 318; see also *Youtsey v. United States* (6th Cir.), 97 F. 937.

The majority say in the present case they were not called upon to decide that question. The minority say that the Court necessarily decided it. These questions had to be decided in this case and in effect they were decided negatively by the majority despite the statement that it was not necessary to decide them at all.

In *Phyle v. Duffy*, 334 U. S. 431 and *Solesbee v. Balkcom*, 339 U. S. 9, questions of post-trial insanity were sufficiently important to require decision. The questions posed in the present case are even more fundamental.

2. The majority opinion says that petitioner has a substantive right derived from state law not to be tried while insane. The majority then concludes that "Smith is entitled to have procedural due process observed in the protection of these substantive rights even though substantive due process would not compel the right to be given."

The majority cites no case but petitioner hopes the majority is right. So, it is necessary to decide this case in the light of the procedural due process question arising under the Fourteenth Amendment and not merely by considering whether the state court conformed with state procedure. This is what the majority did despite the above statement.

3. The question whether a state court can accept a plea of guilty and sentence to death a putative insane man, as to whom no judicial inquiry has been made prior to acceptance of plea and without prior investigation of such insanity, is too important to rest in the unsatisfactory situation in which the divided views of the Court of Appeals leaves it. In effect the situation is the same as if two panels from different circuits were in conflict.

4. The question whether, in the light of present medical science a state court meets its duty under procedural due process restrictions of the Fourteenth Amendment by appointing legal counsel but refusing to bear the expense of a medical witness on a reasonable claim of mental incompetency should be settled. To answer this in the affirmative does not mean that the state would also have to furnish engineers, plumbers, repairmen or other experts.

5. The question whether a putative insane man may be adjudged mentally competent *to be tried* by applying the legally irrelevant formula of the M'Naghten rule should be decided. So also should the separate question of the right

of state courts, in the light of modern medicine and science, to apply with rigid formality the M'Naghten rule to the question of responsibility for crime.

Neither the trial court nor the majority opinion of the lower court seems to have grasped the great distinction between the "insanity" which will excuse conduct otherwise criminal and the "insanity" which bars trial. The latter never did involve the M'Naghten rule. A man who cannot appreciate his peril or cooperate with counsel may not be tried. It is not controlling that he may or may not have known the difference between right and wrong at the commission of the act charged as murder. This is not mere error; this unavoidable question has not been decided in this case.

In the light of the evidence of the slowly progressive and presently profound mental illness of the psychiatrist himself, subsequently ascertained, it is at least doubtful even that the psychiatrist selected by the court was the impartial expert upon whose judgment a court could confidently rely to spell the difference between due process and the lack of it. See affidavit of counsel post p. 21.

The issues of this case are important to the administration of criminal justice. They are mighty important to petitioner too. Six Federal judges have said petitioner's case should be heard and adjudicated by finding facts. This has never been done. He cannot be permitted to die unheard.

WHEREFORE, your petitioner, James Smith, respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings therein; and that the order of the Court of Appeals for the Third Circuit affirming the judgment and

sentence be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

HERBERT S. LEVIN,
THOMAS D. MCBRIDE,
Attorneys for Petitioner.

SUPPLEMENTAL APPENDIX TO PETITION.

Affidavit of Counsel.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

THOMAS D. MCBRIDE, being duly sworn according to law, deposes and says:

1. This case was argued orally by him before the full bench consisting of the seven judges of the Court of Appeals on April 20, 1951. The Opinion of the Court and the Dissenting Opinion were delivered on October 26, 1951.

2. One of the crucial issues in the case was whether petitioner, at the time of entering a plea of Guilty to the crime of Murder, was mentally competent to do so. Another crucial issue was whether he was insane at the time of the commission of the "crime".

The majority opinion, in resolving certain of petitioner's procedural points on these issues against him specifically and necessarily rests upon the fact that during the course of its proceedings, the sentencing court had appointed "an apparently qualified and impartial expert", Dr. William Drayton, to examine petitioner and had called him as its witness.

The majority stresses in a footnote Dr. Drayton's qualifications as follows:

> "Chief of the Philadelphia General Hospital psychiatric department since 1926; neuro-psychiatrist in the Philadelphia Municipal Court since 1922; associate professor neuropsychiatry in the Graduate School of Medicine of the University of Pennsylvania."

The majority held that all questions as to the sufficiency of the examination and its scientific accuracy would affect only the weight of Dr. William Drayton's evidence and hence was not before the court on habeas corpus. It assumed his competency to make psychiatric examinations as

of the time he made them because of his stated qualifications. The legal adequacy of the examination by Dr. Drayton, which is attacked by the minority opinion, was made a few days prior to November 5, 1948. If Dr. William Drayton was not at that time competent to make such examination, or if his own capacity to form judgments was not that of an "expert", more than the mere weight of his testimony would have been affected.

3. In December, 1951, rumors came to deponent's attention that Dr. Drayton had ceased to be connected with either the Graduate School of Medicine or the Philadelphia General Hospital Psychiatric Department in 1949 and was suffering from some form of senile dementia. Deponent investigated and has ascertained the following facts:

On September 20, 1951 (about one month prior to the opinion of the Court of Appeals) Dr. Winifred Stewart Drayton, wife of Dr. Drayton, filed a petition in the Court of Common Pleas No. 3 of Philadelphia County for the appointment of a guardian for him, as of No. 383, September Term, 1951, in which she stated, under oath, that owing to weakness of mind Dr. Drayton was unable to take care of his property and was liable to dissipate or lose the same or become the victim of designing persons.

On September 18, 1951, Dr. William Drayton had been committed under the Pennsylvania Mental Health Act to the Pennsylvania Hospital for Mental Diseases and remained there for observation and treatment until October 12, 1951, at which time he was transferred to the Veterans Hospital, Coatesville, where he is now suffering from a non-recoverable mental illness.

Deponent, with the full consent of Dr. Winifred Drayton, wife of Dr. Drayton, interviewed Dr. Joseph Hughes, 111 N. 49th Street, Philadelphia, Pa., the psychiatrist who is handling the case of Dr. William Drayton.

Dr. Hughes informed deponent on January 12, 1952, that Dr. Drayton's present condition is non-recoverable and that it may be described as "Psychosis with Cerebral

Arteriosclerosis". He says that Dr. Drayton no longer has any judgment or insight, that he is unable even to recognize his wife or friends, that he is confused, disturbed and overactive; that he has progressive loss of memory and confabulates to fill in memory defects. He added that this intellectual deterioration was evidenced even on a clinical level in January, 1951.

4. Deponent avers that the depths and profoundness of the gradually progressive arterio-sclerotic changes which have taken place in Dr. Drayton show that his sole opinion stated to the court on November 5, 1948, to the effect that petitioner had no psychosis and was merely "faking", cannot be legally relied upon as the sole determining factor to demonstrate whether petitioner received due process of law. The case of petitioner warrants and requires further investigation even as to this particular aspect by reference to Philadelphia General Hospital and Graduate School records, etc., concerning Dr. Drayton which may be done if the case is remanded for hearing.

5. Since the appeal to the Court of Appeals was, and this petition for certiorari is, for the purpose of securing a hearing in the District Court on the procedural issues raised by the petition for writ of habeas corpus, deponent, on behalf of petitioner, asks leave that this affidavit be received and acted upon by this Court, particularly since the facts stated in it were discovered too late to form the basis of a petition for reargument before the Court of Appeals and so soon before the expiration of the time within which certiorari must be applied for as to make it necessary that they be communicated to this Court at once.

THOMAS D. MCBRIDE.

Sworn to and subscribed before me this 14th day of January, A. D. 1952.

MARTHA A. RAU,
Notary Public.

(Seal)

My Commission Expires 1/7/55.

BRIEF IN SUPPORT OF PETITION.

Summary of Argument.

It will be the purpose of petitioner to show that he suffered separate and distinct, though related denials of the procedural due process guaranteed him by the Fourteenth Amendment at various stages of these proceedings.

The first occurred when he was arraigned on this capital charge and no appointment of counsel was made prior thereto. He thereby lost his only opportunity to have a jury trial *in limine* to decide whether he was competent to be tried on the main issue.

By reason of having been overreached on arraignment, and being thereafter denied other statutory methods of having his mental capacity adjudicated he entered a plea of guilty. He will argue that this plea of guilty is void in that (a) it was a conditional rather than an absolute plea and hence the trial court was without legal warrant to accept it; (b) although the plea of Guilty admitted only murder in the second degree, the court improperly, after hearing only the Commonwealth's version of the case, found defendant guilty of murder in the first degree and thereafter unduly restricted his evidence on the facts as well as on mental illness to the question of the kind of sentence to be imposed; (c) a court convened to hear a guilty plea has authority only to fix the degree of the homicide to be imposed and therefore, being without authority to decide mental capacity, did not decide it; (d) if the court attempted to decide petitioner's mental capacity it received no competent data upon which to base decision.

It will be his purpose thereafter to demonstrate that the Supreme Court of Pennsylvania not only failed to re-

dress these denials of due process by the trial court but itself denied him due process in that it refused to and did not adjudicate his case.

Petitioner will finally contend that the District Court for the Eastern District of Pennsylvania denied him due process under the Fifth Amendment in refusing to hear and adjudicate his petition for habeas corpus which was not only procedurally correct but which, if true, demonstrated the foregoing violation of Fourteenth Amendment rights by the Pennsylvania courts, both trial and appellate.

General Statement.

At the threshold we are met by the fundamental questions posed and left unanswered by the majority opinion of the court below. Consonant with the Fourteenth Amendment may a State (a) hold an insane man criminally responsible for his conduct; (b) try an insane man; (c) execute an insane man? Lumping together these three vastly different procedural and substantive questions the majority specifically answers all of them "We do not know" (Opinion p. 5, 192 F. 2d at 544). This doubt colors the whole opinion.

As justification for this quandary, the majority cites *Solesbee v. Balkcom*; 339 U. S. 9. But the *Solesbee* case expressed no such doubt. It dealt only with procedural questions as to post-trial insanity (subsection (c) above) and simply held that states were free to leave that question to fair decision by the executive rather than the judiciary.

At this dubious point the majority opinion below then went on to hold, however, that since Pennsylvania law guarantees the *substantive* right of insane persons not to be held criminally responsible or to be tried, a federal question may arise as to whether *procedural* due process has been observed. But, having said this the majority were content to examine in the light of Pennsylvania law the methods Pennsylvania adopted (or failed to adopt) to ascertain the fact of insanity. The majority did not really

decide the question "What does the United States Constitution say about the handling of this case by Pennsylvania?"; or the further question "Was it fundamentally fair?" The last two are the real questions that should have been asked and answered. And in the present context they must be applied to the purely judicial (not executive) questions of "insanity" at the time of the killing and at the time of each step of the judicial proceedings.

A federal court, faced with decision of a claim such as that made in the present case, must examine the question for itself. *Hawk v. Olson*, 326 U. S. 271. In *Johnson v. Zerbst*, 304 U. S. 458, 468, this Court said "A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.'" See also *Forthoffer v. Swope*, 103 F. 2d 707, 710.

The majority opinion of the District Court went so far as to hold that so long as the State Supreme Court carefully and fully considered the claim of violation of *federal* constitutional right the federal court should not reconsider the claim even if the state court's conclusions were wrong. A similar reluctance pervades the majority opinion of the Court of Appeals.[1] The true rule is that when the state does not provide corrective judicial process, the Federal courts will entertain habeas corpus to redress the violation of a Federal constitutional right. *White v. Ragen*, 324 U. S. 760, 89 L. ed. 932, 65 S. Ct. 978. When the corrective process is provided by the state but the Federal question of constitutional violation, is erroneously decided

1. The dominant note of the opinion is that although a federal court is bound to pass upon claims of violation of federal rights yet "That these allegations have been decided on the merits by the highest state court is a fact to be given great weight by a district court in passing upon petitions for habeas corpus" (Opinion, p. 5, 192 F.2d at 544). In the context in which the majority made this statement it would appear to mean that the mere fact that the state decided the merits of the federal claim at all is to be given great weight by a federal court which is to decide whether that federal claim had been decided correctly. If this is so, what comes of the rule that the federal court must be careful to decide "for itself" the federal claim in view of the fact that prior state adjudication of the federal claim is a condition precedent to federal review?

the appropriate federal court has the responsibility to review the state proceedings. *Williams v. Kaiser,* 323 U. S. 471, 472, 89 L. ed. 398, 400, 65 S. Ct. 363; *Tomkins v. Missouri,* 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; *Hawk v. Olson,* 326 U. S. 271.

It is true that "due" process allows for difference in state procedures and that a majority of this Court hold that all the specific guarantees of the first eight amendments are not made operative against the states by the Fourteenth. Nevertheless, while this Court will take into consideration an established state procedure as an element in deciding whether that procedure violates due process, it would be permitting the state to lift itself by its own bootstraps to hold in a particular case that the decision of the highest court of a state (although binding as to what state law is) would be entitled to controlling weight on the question whether that law or a state court acting under color of that law has violated the federal constitution.

It certainly seems as though the Federal court should approach the problem by considering not only what Pennsylvania is doing and has done but what was permissible under common law and what is now permissible according to accepted civilized standards of fairness.

Except for a short time it was the rule under common law that an insane person was not criminally responsible and could not plead to an arraignment, be subjected to a trial or after trial receive judgment or after judgment undergo punishment. 1 *Hale P. C.* 34, 35; 4 *Bl. Comm.* 24, 25; 2 *Bish. Cr. Proc.* Sec. 666; *Frith's Case,* 22 How. St. Tr. 307; *Rex v. Pritchard,* 7 Car. & P. 303; *Commonwealth v. Ragone,* 317 Pa. 115;[2] *Bonds v. State,* Mart. & Y. 143; *Crocker v. State,* 60 Wis. 556, 19 N. W. 435; *Taffe v. State,* 23 Ark. 34; *Freeman v. People,* 4 Denio, 9; *Underwood v.*

2. The Supreme Court of Pennsylvania in the Ragone case, supra, says (p. 125): "Blackstone refers to a statute passed 'in the bloody reign of Henry VIII, . . . which enacted, that if a person being compos mentis should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law [he says] was repealed by the statute of 1 and 2 Ph. and M., c. 10.'"

People, 32 Mich. 1; *Guagando v. State*, 41 Tex. 626; *State v. Reed*, 41 La. Ann. 581, 7 South. 132. See *Nobles v. Georgia*, 168 U. S. 398; *Solesbee v. Balkcom*, 339 U. S. 9; *Youtsey v. United States*, 97 Fed. Rep. 937.

Even a man who admittedly was sane at the time he committed an offense cannot be called upon to plead or be tried if he has meanwhile become insane. *Commonwealth v. Ragone*, 317 Pa. 113. See also *Commonwealth v. Scovern*, 292 Pa. 26; *Commonwealth v. Endrukat*, 231 Pa. 529; *Commonwealth v. Cilione*, 293 Pa. 208; *Webber v. Commonwealth*, 119 Pa. 223. To do so would offend against that concept of fundamental fairness which is a minimum requirement of due process of law. *United States ex rel. Mazy v. Ragen*, 149 F. 2d 948; *People v. Nierstheimer*, 401 Ill. 260, 81 N. E. 2d 900; *State v. David*, 6 Wash. 2d 696, 108 P. 2d 641; *Carter v. State*, 198 Miss. 523, 21 So. 2d 404. cf. *Phyle v. Duffy*, 334 U. S. 431; *Ashley v. Pescor*, 147 F. 2d 318.

It would seem to follow that where accused's mental condition is questioned on a substantial basis the court must conduct an inquiry and employ such methods as may be necessary to reach a conclusion on the question and this entirely apart from whether it is satisfied with the evidence presented by the defense or prosecution. *United States v. Harriman*, 4 F. Supp. 186. See also *Deeb v. State*, 118 Fla. 88, 158 So. 80; *State v. Detar*, 125 Kansas 218, 263 P. 1071.

Where there is a doubt of defendant's sanity, even his counsel cannot waive such an inquiry. *Signs v. State*, 35 Okl. Cr. 340, 250 P. 938; *Norford v. State*, 116 Tex. Cr. Rep. 533, 34 S. W. 2d 290.

It seems to follow also that where the question arises before trial the inquiry ought to be made before trial because the test is not the ability to distinguish between right and wrong at the time of the act charged, but the then present ability of the accused properly to appreciate his peril and rationally assist in his own defense.

To "rationally assist in his own defense" the accused must have memory and mental capacity to prepare for trial by consulting with and assisting his counsel. In any case much less a capital one, how can such a question fairly be left until the trial itself?

This is not to say that in every case such inquiry must be made. It is not contended even that a mere suggestion of insanity throws such an affirmative duty upon the court. Petitioner does assert that in the present case the danger signals were constantly flaunted before the court. Before permitting petitioner to *plead guilty* of a capital offense a legally organized court was required to adjudicate[3] on competent relevant data, his mental capacity to waive his right to jury trial on the issue of degree of guilt and fixing of penalty. This has not been done in this case by any such Pennsylvania court.

It becomes important to consider, therefore, at what points in this proceeding the trial court had before it the opportunity and power of adjudicating this crucial question and how and why it failed or refused to do so.

Petitioner Was Overreached at Arraignment.

Petitioner, admittedly an indigent man, was arraigned without counsel a week after his indictment. An utter stranger, whom he had never seen before and never saw again, was directed by the court to stand beside him. Despite the fact that the Act of March 22, 1907, P. L. 31, Section 1, as amended, 19 P. S. 784,[4] requires the ap-

3. An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering a judgment. *Chase-Hibbard M. Co. v. City of Elmira*, 207 N.Y. 455, 460; *Sans v. City of New York*, 64 N.Y.S. 681, 31 Misc. 559, 560; *State v. Huhn*, 346 Mo. 695, 700, 142 S.W.2d 1064, 1066; *Genzer v. Fillips*, 134 S.W.2d 730, 732.

4. "Whenever any person, being under indictment, charged with murder, shall make and file with the clerk of the court of quarter sessions an affidavit, setting forth that he or she is wholly destitute of means to employ counsel and prepare for his or her defense, the judge sitting in the court of oyer and terminer, to whom such affidavit is presented, shall assign to such person counsel, not exceeding two, to represent and defend such person at the trial of the case; . . ." As amended 1949, April 6, P. L. 406, § 1.

pointment of counsel for indigent persons indicted for murder in Pennsylvania, no counsel was appointed prior to arraignment. Neither the court nor the strange lawyer who was directed to stand beside petitioner knew anything about petitioner's background of insanity[5] and no attempt whatever was made to ascertain anything about petitioner even to the extent of learning whether he was represented by counsel (Amended Paragraph 3 of Petition for Writ of Habeas Corpus, Appendix 17a).

These averments must be assumed to be true since no opportunity was afforded to prove them either in the State Supreme Court or in the District Court below. *Hawk v. Olson*, 326 U. S. 271. Indeed the Respondents have never contended otherwise. Despite this, the State Supreme Court made the statement (364 Pa. at 103) that petitioner had counsel at each stage of the proceedings, and the majority opinion of the court below says "Nor is it a case where a friendless man has been overreached because he did not have legal counsel" (192 F. 2d 541 at 543). Neither statement could be further from the facts. The fact is that he was overreached at his arraignment because he did not have counsel present.

The majority opinion also says "The long record shows that Smith's claimed rights have been vigorously and intelligently asserted". Any such assertion came too late. And even when asserted they were denied.

The necessity of appointment of counsel in capital cases applies to every step of the proceedings,[6] including

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5. This background is stated at length in the dissenting opinion, p. 38 et seq., 192 F. 2d at 561 et seq.

6. This Court has repeatedly held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. Carter v. Illinois, 329 U. S. 173, 91 L. ed. 172, 67 S. Ct. 216; Hawk v. Olson, 326 U. S. 271, 90 L. ed. 61, 66 S. Ct. 116; Tomkins v. Missouri, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; Williams v. Kaiser, 323 U. S 471, 89 L. ed. 398, 65 S. Ct. 363; Powell v Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 ALR 527; Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265. See also, DeMeerleer v. Michigan, 329 U. S. 663, 91 L. ed. 584, 67 S. Ct. 596 (convicted of first degree murder and sentenced to life imprisonment). In the

arraignment. *Evans v. Rives*, 126 F. 2d 633; *Robinson v. Johnston*, 50 F. Supp. 774.

In *Hawk v. Olson*, 326 U. S. 271 at 278, this Court said "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment". It would appear *a fortiori* that failure to appoint any counsel at all between indictment and arraignment on a capital charge also violates the Fourteenth Amendment.

(a) In Capital Cases Prejudice Is Presumed to Result from Denial of a Constitutional Right.

Petitioner has shown that he was arraigned without counsel. What follows? In a capital case must he go further and show that prejudice resulted? And how much? Or must the State on the other hand show that such arraignment was not prejudicial? Has the harmless error doctrine any applicability at all?

The majority opinion says "It is a little hard to see how entering a plea of not guilty can deprive a man of any rights". (Opinion p. 6, 192 F. 2d at 545). The three dissenting judges see it clearly and state it cogently (pp. 22, et seq., 192 F. 2d 553 et seq.).

The majority then goes on to say that even though Petitioner lost the right to invoke the discretion of the court to grant a trial *in limine* of his mental competency that was not much of a right since the court had very broad discretion and could have postponed the trial of that preliminary question until the trial on the general issue. The majority then says "We conclude that the loss of such an opportunity was *not so prejudicial* to defendant as to

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classic case of Powell v. Alabama, 287 U. S. 45, Mr. Justice Sutherland, speaking of the defendant, says: "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

amount to violation of due process" (Opinion p. 7, 192 F. 2d at 545).

That misses the point. Under the rule of *Powell v. Alabama*, it is the failure in a capital case to appoint counsel that of itself violates due process. See also *Williams v. Kaiser*, 323 U. S. 471. In non-capital cases some resulting harm must also be shown. *Townsend v. Penna.*, 334 U. S. 736; *Bute v. Illinois*, 333 U. S. 640.[7] Upon remand of the *Townsend* case the Pennsylvania Supreme Court held that even though the prejudice entered the case *after* Townsend's plea of guilty, nevertheless not only the sentence but the plea itself was set aside. *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35. This followed because it was the failure to appoint counsel prior to plea which accounted for the later prejudice. The situation was thought to be analogous to a blood stream infection which cannot be localized to the point of entry, and hence all the proceedings were set aside.

And besides, the majority has disregarded the direct holding of this Court in *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457. There this Court said that the right to counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[8]

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7. In *Bute v. Illinois*, 333 U. S. 640, 674, the majority opinion denied any affirmative duty to appoint counsel by state courts in non-capital cases, in the absence of a request, but agreed that the Court in capital cases should affirmatively initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel, or, in the event of the inability of the accused to secure counsel, to assign competent counsel to the accused to conduct his defense. Here, none of those things was done at or before arraignment.

8. It even disregarded its own holding in *United States v. Venuto*, 182 F. 2d 519, where the trial court was reversed for unduly enjoining counsel from consulting with his client during a recessed cross-examination. The Opinion was written by Judge Lederle sitting by designation but joined in by Chief Judge Biggs, one of the dissenting judges in the present case, and Judge Hastie, one of the majority. In that case the Court quoted from *Glasser v. United States*, 315 U. S. at p. 76 and then said "We reject the government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution." Even in a non-capital state case when defendant has pleaded guilty all that need be proved is that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted" in the sentence. *Foster v. Illinois*, 332 U.S. 134, 137.

The majority said (p. 8, 192 F. 2d 546):

> "We conclude, therefore, that even if Pennsylvania did not provide defendant with 'effective assistance of counsel' at his arraignment, he suffered no deprivation of federal constitutional right because of it."

This is a brand new statement of law. It is far different from saying that the nature of the harm resulting from failure to appoint counsel may be considered on the question whether such failure violates a constitutional right.

Clearly in this capital case it was the duty of Pennsylvania to provide defendant with effective assistance of counsel and the Court is saying that even if it did not do so no right was violated. And the context shows that the Court says that no right was violated because "Due process does not go so far as to require a hearing on mental condition in any particular manner or at any particular stage in the proceedings. Certainly it does not require a hearing *in limine* on the question as counsel for relator contend. The most that it requires, in our view, is an opportunity to have adequate hearing on the question before guilt is finally determined."

It becomes clear, therefore, that the majority is holding not only that the denial of "effective assistance of counsel" is not of itself a violation of constitutional right but that it does not attain that importance unless an additional separate violation of constitutional right results from it. Even in non-capital cases where harm must be shown to have resulted, the harm need not be so great as to constitute of itself a separate and distinct violation of constitutional right but need be only prejudicial. *Bute v. Illinois, supra; Townsend v. Pennsylvania, supra.*

The majority opinion does not assert that at arraignment the denial of a fair chance to invoke the discretion of

the court to impanel a special jury was not prejudicial.[8a] The conclusion is "that the loss of such an opportunity was *not so prejudicial* to defendant as to amount to a violation of due process." (Emphasis supplied.)

It is respectfully suggested that to try the issue of present mental incompetency along with the main issue, whether or not justified under the old common law, does not now meet the test of due process. But, at the very least, it is not as satisfactory as having the issue disposed of *in limine*. At common law a defendant charged with felony was not permitted to testify. It is precisely because of the present right of a defendant to testify that it is essentially unfair to put him on trial before the same jury on two issues, (1) mental capacity to be tried; (2) guilt or innocence of the charge.

Obviously, to do so would be in effect to rule out the first issue or to prevent the defendant from testifying on the merits. It is miserably unfair to require a defendant to choose between remaining off the stand or to testify on the merits and at the same time attempt to convince the jury that they ought to disregard his evidence because he is so mentally incapable that he does not know what he is talking about. Not all persons who unsuccessfully claim insanity are first degree murderers. Some of them may be not guilty in any event or guilty in a lesser degree. This is the anomalous situation that counsel, had petitioner had one at arraignment, could have pointed out in invoking the discretion of the court to grant a jury trial *in limine*.

(b) Petitioner in Fact Was Fatally Prejudiced.

The question is not whether Petitioner unaided could have persuaded the court to exercise what the majority opinion calls a "broad discretion" but whether counsel,

8a. The State Supreme Court had held in *Webber v. Commonwealth*, 119 Pa. 223, that under the common law the court had discretion at arraignment to specially impanel a jury to try the issue of mental capacity to plead or defer the trial of that issue and have it disposed of by the jury which tried the indictment.

seasonably appointed and informed of petitioner's background, could have persuaded the court.[9] The court might not have granted a jury trial *in limine* but then again it might have.

The right to have informed counsel attempt to persuade a judge to do something which that judge has the discretionary right to do is a far different thing from petitioner alone having such right. Any other view would negative the value of counsel in any case. Everybody knows that it is particularly in matters involving discretion that the presentation of the facts and argument thereon by counsel may persuade a court to take affirmative action on behalf of a client where the client, left to present the facts and arguments himself, might not be able to persuade the court. Cf. *Townsend v. Pennsylvania, supra.*

The majority opinion points out that there still remained certain ways in which petitioner's mental condition could have been decided (Opinion, p. 8, 192 F. 2d at 545 et seq.). The Court concludes, therefore, that whether he was overreached in this *one* way is unimportant since he still had others. It is submitted the opposite view should be taken. If a man has three or four legal ways of protecting a right he cannot be overreached on any of them, or, at the very least, the remaining ones must leave him substantially as much protection without the one upon which he was overreached. *None of the other ways provided for trial by jury of the issue of mental competency prior to trial of the general issue.* Had petitioner been

9. Even the Opinion of the State Supreme Court points up the harm resulting from the arraignment. The Court said (364 Pa. 93, 106, 107):

"* * * Now counsel contends that the insanity with which Smith was afflicted in 1945 was permanent. If it was, he was insane at the time he committed the murder charged and it was the duty of the defendant's counsel to ask to have the issue of his sanity determined by a court and jury as provided by Section 67 of the Act of March 31, 1860, P. L. 427, 19 P. S. 1352.

Petitioner agrees. This section is applicable at arraignment. (Supplemental appendix to Brief for petitioner 49a). But the stranger who stood beside petitioner at arraignment as "defense counsel" was necessarily uninformed of the facts which would have warranted the court in directing that petitioner's sanity be determined *in limine* by a jury.

afforded a jury trial *in limine* he would have been attended at that trial with his usual constitutional safeguards, such as confrontation, etc. He would even have had the right to have the jury properly instructed on the law. *Commonwealth v. Simanowicz,* 242 Pa. 402.

But in all other pre-trial statutory proceedings, such as commission in lunacy, etc., there are none of the usual constitutional safeguards such as confrontation. *Commonwealth v. Iacobino,* 319 Pa. 65.

The difference could hardly be more forcefully illustrated than by the *Simanowicz* case, *supra.* There, the court permitted counsel to act as a party petitioner in alleging that the defendant was not mentally competent to confer with him and granted an issue under Section 67 of the Act of March 31, 1860, P. L. 427 (Supplemental Appendix to Brief for Petitioner, p. 49a).[9a] At the trial of this preliminary issue the court, however, incorrectly instructed the jury that the defendant had the burden of proving insanity beyond a reasonable doubt instead of by fairly preponderating evidence. The jury found the defendant sane. Counsel then advised, and Simanowicz entered, a plea of Guilty. Simanowicz was condemned to death. Upon appeal the Supreme Court held that the error in the preliminary proceeding rendered that proceeding void and the situation was not cured when later, by advice of counsel, defendant pleaded Guilty. The Court said "The prisoner never had a trial on the preliminary issue which was properly submitted to the jury and his right to one could not be waived by counsel."

In the present instance defendant had no such trial either and was prevented from the opportunity of getting one by being arraigned without counsel. Petitioner, like Simanowicz, pleaded Guilty on advice of counsel. The court in Simanowicz' case held that such plea was void; but the court in the present case held that petitioner was bound by it.

9a. This is the section applicable at arraignment referred to above.

There is no substantial difference between the two cases. Certainly the loss of such a preliminary jury trial is a real loss. The loss was not merely a difference in the tribunal that might do the deciding, that is, *Jury v. Commission*, although that too may be tremendously important. The fundamental difference lies in the procedural safeguards attendant upon the jury trial but not upon the commission hearing.

It must be emphasized that the question here however, is not whether this denial of jury trial *in limine* is itself a denial of due process. The question is whether this loss constituted prejudice resulting from failure to appoint Counsel. This is a matter for independent federal appraisal.

The further proceedings in the case only illustrate that petitioner, having been put on the wrong road, was unable to get back. After his arraignment, having lost his *only* chance of having his mental competency determined *in limine* by a *jury*, he tried to pursue the other non-jury alternatives thought to be still open to him. He was denied them also. Here is what happened:

Petitioner had been arraigned on February 25, 1948. Then, on or about March 16, 1948, Mr. Levin, who was still private counsel for petitioner, filed a petition with the Court of Oyer and Terminer of Philadelphia County, asking for the appointment of a Commission to inquire into and report upon the mental condition of petitioner. (Supplemental Appendix 62a.) This petition recited such a previous history of mental derangement as would warrant the appointment of such a Commission, not only under the Pennsylvania Mental Health Act of July 11, 1923, P. L. 998, 50 Purdon Statutes 1, *et seq.*, but also under the common law power of the court which has been held to remain unaffected by the statute. See *Commonwealth v. Barnes*, 280 Pa. 351, 124 A. 636. The Commonwealth filed no answer to this petition. Nevertheless, it was dismissed (para-

graph 5, Petition for Writ of Habeas Corpus, Appendix 5a).[10]

Thereafter, counsel unsuccessfully exhausted all available means of ascertaining the history of petitioner's mental illness. The conspicuous lack of success was due only to petitioner's poverty which deprived petitioner of the effective assistance which he could have had if he were able to pay for a reasonable investigation (paragraph 6, Petition for Writ of Habeas Corpus, Appendix 5a).

Thereafter, counsel prepared a petition to withdraw as private counsel, and filed it with the judge to whom petitioner's case had been assigned for trial. That petition set forth the mental history of petitioner so far as counsel had been able to ascertain it and the inability of counsel to proceed with the proper preparation of the case by reason of petitioner's poverty, and suggested that upon allowance of the petition to withdraw, counsel could then be appointed to represent petitioner and that the desired information could possibly be obtained by such court-appointed counsel (paragraph 7, Petition for Writ of Habeas Corpus, Appendix 5a, paragraph 15 of Petition for Leave to Withdraw, Supplemental Appendix 69a).

Upon allowance of said petition Mr. Levin was appointed as counsel together with Harry Berkowitz, Esquire. They endeavored, in consultation with the prosecuting attorney and the court, to obtain a psychiatric examination of petitioner, to no avail (N. T. 239; Petition for Writ, paragraph 8, Appendix, p. 5a), and, in consequence, they were unable properly to determine whether petitioner was sane at the time he killed the cab driver, or able to comprehend the charges against him, and able to cooperate in his defense (paragraph 8, Petition for Writ of Habeas Corpus, Appendix 5a).

The issue of mental incompetency in Bar of trial was fairly raised at every opportunity petitioner had to raise

10. See arguments *post* on footnotes 12 and 13 of the opinion of the court below.

it but it was never decided in any judicial proceeding whatever much less one which meets the test of due process. These attempts were not mere "suggestions" of insanity, they constituted no mere fishing expedition. They were supported by allegations of substantial facts.

Now we come to footnotes 12 and 13 of the majority opinion (p. 8, 192 F. 2d at 545, 546). These innocent looking footnotes may mislead.

The majority opinion says in footnote 12 "Relator's counsel applied to the court for the appointment of such a Commission but it was denied because only the warden may make such application. See *Commonwealth v. Barnes*, 280 Pa. 351, 124 Atl. 636 (1924). The warden refused to apply for it. *Such* refusal is reviewable by mandamus. See *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 116, 71 A. 2d 107, 119 (1950), cert. den. 340 U. S. 812 (1950)." (Emphasis supplied.)

At petitioner's arraignment even the majority opinion concedes that the court was free to exercise its own discretion to grant him a trial by jury *in limine*. Thereafter, it had no such authority. Not only did the warden refuse to apply for a Commission but he refused to apply for it at the request of the judge. The Court held itself powerless because of the warden's refusal and without authority to grant the petition. (See Opinion of State Supreme Court, Supplemental Appendix for Appellant, pp. 33-34).

The majority opinion *now* indicates that the warden's refusal was reviewable by mandamus; but the judge before whom the petition was pending did not say that. Neither did the Supreme Court of Pennsylvania. They had held precisely the contrary. The law was that the warden was vested with power to prevent the court from acting. *Commonwealth v. Barnes*, 280 Pa. 351; *Commonwealth v. Green*, 346 Pa. 172; *Commonwealth v. Dunn*, 47 D. & C. 685.

The case cited by the majority as authority for the court to mandamus the Warden is this very case. It was in the post-trial writ of habeas corpus that the Supreme

Court of Pennsylvania for the first time held that a post-trial refusal by the warden is reviewable by mandamus. Petitioner is even being impaled upon *after-discovered law.* The majority perhaps failed to appreciate that. At least they did not point it out. Mandamus was not a remedy which was open to petitioner at the time.[10a]

In footnote 13, the majority says that there was still another way open to petitioner under another paragraph of the same Section 308 which applied to the Warden.[11] This paragraph provides that upon production or appearance of a person charged with a criminal offense in court it shall appear to the court that such person is insane, the court may go through the usual proceedings for his commitment "upon application of some person to be designated by the court". The majority then adds: "This provision appears to have been disregarded or overlooked by counsel."

How about the Court? It appears equally to have been overlooked or disregarded by the court. The petition for appointment of a Commission was filed under the Mental Health Act. It was denied because of the provisions of Section 308 of that Act. Section 308 contains this particular provision. Later, when the case was called for trial, counsel conferred with the assistant district attorney and the judge, and ways and means were sought out of the dilemma (Petition, par. 10, 11, 12). Maybe everybody overlooked it. Who is to suffer? Is this putative insane man the only one in this whole sorry business who is held to a knowledge of the law?

10a. It is not clear as the majority assumes that the pre-trial refusal by the Warden to act as party petitioner has even yet been held to be reviewable by mandamus. The State Supreme Court did say with particular reference to *post-trial* insanity that if the proper prison official refused to act as party petitioner mandamus would lie to compel him to do so. Besides, that is far different from saying that counsel or the petitioner himself could ignore the prison official and act as petitioner without his consent. Indeed it must be remembered that the Judge, with Section 308 before him tried to persuade the warden to act as party petitioner but the warden refused (see Supreme Court Opinion, pp. 33-34). The Court either did not then have the power of mandamus or failed to exercise it.

11. Both paragraphs of Section 308 are quoted in the majority opinion, p. 8, footnotes 12 and 13, 192 F. 2d at 545, 546. The section in full appears in "Supplemental Appendix to Brief for Appellant" pp. 51a-53a.

That same provision referred to by the majority has been in the Mental Health Act of Pennsylvania since 1923. And if it was overlooked here it was overlooked by the Supreme Court of Pennsylvania in *Commonwealth v. Barnes*, 280 Pa. 351, cited by the majority and overlooked by the same Court in *Commonwealth v. Green*, 346 Pa. 172, and by the Quarter Sessions Court in *Commonwealth v. Dunn*, 47 D. & C. 685.

It is to be emphasized that the language quoted by the majority in footnote 13 is part of Section 308 quoted in footnote 12. That entire section was before the court in those cases which held that only the warden or other official was a proper party petitioner.

The State Supreme Court even had that whole section before it in the present case and came to the same conclusion. (Supplemental Appendix for Appellant, pp. 33-34, 364 Pa. at 97.) In fact, counsel did *not* overlook this provision but specifically argued it in his brief on law filed in that Court (pp. 23-24). Despite that the State Supreme Court held that neither counsel nor the petitioner himself was a proper party petitioner (pp. 33, 34; 364 Pa. 97, 98. It is clear therefore that such a remedy was not available to petitioner. The decision of the Supreme Court of Pennsylvania settles that point and the Court below is not free to disagree.

Presumably the various opinions of the State Supreme Court holding that under all the provisions of Section 308 the proper prison official is an indispensable party petitioner were stated with full knowledge of the language of the fifth paragraph. Consistent with that interpretation, the fifth paragraph would then apply to criminal cases where the defendant was not incarcerated in jail waiting trial. It would cover cases where he had been released upon bail.

It is clear, therefore, that having been effectually prevented by failure to appoint counsel at arraignment of the right to invoke the discretion of the court to grant a jury

trial *in limine* petitioner was later denied the privilege of employing a psychiatrist at public expense, and was also denied all statutory rights of having his mental competency to be decided prior to trial. The only way thereafter in which he could have his mental capacity determined would be by persisting in his plea of not guilty and having the issue submitted to the very jury which would try the general issue of guilt or innocence.

Even if this were still open to him it does not excuse the denial of the other remedies. But, as pointed out above, this seems to be a pretty unrealistic procedure in view of the fact that it would put him to the necessity of remaining off the stand on the issue of innocence or degree of guilt. Besides, since at such trial the burden would lie on petitioner to prove such insanity by a preponderance of the evidence, he could not do so on lay testimony and had no means whereby he could secure psychiatric aid. This is specifically averred in Paragraph 31 of the Petition.

Being unable, without such expert testimony, to meet this burden of proof (Petition, Paragraph 9) the situation of petitioner was made known to the court (Petition, Paragraph 10) and with full knowledge of it, a conditional plea of guilty was accepted (Petition, Paragraphs 12, 13). That is how he got into the cul-de-sac which prevented him from persisting in the plea of not guilty.

Therefore the question of petitioner's mental capacity to be tried was never determined as a separate issue prior to acceptance of the plea. Once the plea of guilty was accepted it put it beyond the power of the judges assembled en banc (whose sole statutory power was to fix the degree of guilt and the penalty to be fixed thereon) to adjudicate the issue of petitioner's insanity. (See Pennsylvania Statute, Supplemental Appendix to Brief for Appellant, p. 54a). No legally constituted tribunal with power to decide that question was ever assembled in this case and that question therefore has never been legally determined. This impasse and this result was caused, to a large degree at least, by the arraignment of petitioner without counsel.

Petitioner invites the attention of the Court to *Frame v. Hudspeth*, 109 F. 2d 356 (10th Circuit), in which it was held that where the trial court's attention was called to the fact that accused had once been adjudged insane and had been an inmate of an insane asylum, it became the court's duty to make a specific finding regarding accused's mental condition and in absence of any such finding the proceedings at time of trial could not be sustained. However, in the *Frame* case the Circuit Court of Appeals did not reverse the District Court which had failed specifically to make such finding, holding that there was sufficient evidence on the record to show that the District Court was justified in accepting a plea of guilty. One judge dissented. This Court granted certiorari and reversed the Circuit Court of Appeals and directed that the case be remanded for a specific finding. *Frame v. Hudspeth*, 309 U. S. 632, 60 S. Ct. 712. Such differences as distinguish criminal cases which come here from a state from those from lower federal courts seem inapplicable to distinguish this case.

See also *Robinson v. Johnston*, 50 F. Supp. 774; *Honaker v. Cox*, 51 F. Supp. 829.

The State Denied "Effective Assistance" of Counsel When Under the Facts of This Case It Denied the Requests for Appointment of a Psychiatrist to Aid the Appointed Lawyer.

Petitioner relies upon the analysis of the dissenting opinion (pp. 34-36, 192 F. 2d at pp. 559-60). He would like, however, to make the following supplementary observations regarding the majority opinion.

There can be no doubt that the request for the appointment of a psychiatrist was made [12] (see N. T. 239; See also Supplemental Appendix to Brief for Appellant, 62a, 64a. Id. paragraph 11, 68a, 71a; Supplemental Appendix for Appellant, p. 9, paragraph 31. Id. paragraph 34, p. 10).

12. The majority says that "There is nothing in the record that a request for such help was ever made." This flies directly in the face of the record.

The majority opinion indicates (p. 10, 192 F. 2d at 546) that Petitioner contended as a general proposition that it is lack of due process of law to fail to provide a psychiatrist at public expense to assist an indigent defendant's appointed lawyers in any case which involves a question of his insanity. This is not so.

He does not contend that the right shall exist in every case or on a mere suggestion. But in a case such as his, where a sworn petition showed a prior adjudication that he was insane and mentally incompetent to stand trial, on a diagnosis of a progressive disease such as schizophrenia of a hebephrenic or a catatonic type, the refusal of psychiatric aid sterilized the "appointment of counsel". One might be mentally capable of standing trial in January and incapable in June. Anybody who knows anything about schizophrenia knows that it is a psychosis and constitutes legal insanity.

The situation is not the same as the case of a "psychopathic personality" involved in the case of *McGarty v. O'Brien*, 188 F. 2d 151.

The majority opinion relies heavily upon *McGarty* in holding that the appointment of a psychiatrist was not necessary. But there are many fundamental distinctions between this case and that of *McGarty*.

First: Under the Briggs law, Mass. G. L. (Ter. Ed.) c. 123, section 100A, as amended by St. 1941, c. 194, section 11, there was a mandatory requirement for the clerk of the court to give notice to the Department of Mental Health which "shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." This report must be made available to those interested in the trial. These mandatory provisions were followed and McGarty was examined pre-trial in strict accordance with that statute.

In the present case there is no Pennsylvania statute making any such requirement, the court refused pre-trial

to appoint any expert either as a commission in lunacy or as a psychiatrist (N. T. 239) and held itself powerless to do so under the authority of *Commonwealth v. Green*, 346 Pa. 172. There was no pre-trial appointment of any psychiatrist to determine either "criminal responsibility" or "mental capacity to be tried". A psychiatrist was appointed after guilty plea only on the issue of the kind of penalty to be fixed, i.e. life or death. The State Supreme Court concedes all this.[13] Besides, the psychiatrist was not appointed in accordance with any standard procedure either common law or statutory; he was not connected with the trial Court and simply acceded to a request made of him.

Second: *McGarty* had had no previous adjudication of insanity or history of mental disease similar to that in the present case. The pre-trial report in *McGarty's* case concluded with the expression of opinion that "this prisoner is not suffering from any mental disease or defect which would affect his criminal responsibility". As pointed out in Judge Magruder's Opinion, the very category "psychopathic personality" is a rather blurred classification. Nobody pretends that schizoprenia is similar.

Third: The court in the *McGarty* case very carefully limited its opinion to the facts of that case, saying (p. 155):

> "How far the state, having the obligation to afford to the accused a fair trial, a fair opportunity to make his defense, is required under the due process clause

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13. The Opinion says (p. 112); "When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate *penalty* to be imposed upon the defendant." (Emphasis supplied). It is clear that the word "penalty" as thus used meant "sentence." In Pennsylvania "insanity" is not a defense applicable to degrees of homicide. It is either a full defense or none at all. Commowealth v. Iacobino, 319 Pa. 65, 70.

to minimize this disadvantage is a matter which, in other contexts, may deserve serious examination.

The issue presented for decision in the present case is a much narrower one. *This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility.*" (Emphasis supplied.)

But the present case is precisely of that latter kind. Petitions for a Commission in Lunacy and the request for psychiatric examination were denied. It was only after the plea of guilty was accepted, the Commonwealth's evidence fully heard and the court had already determined that the defendant was guilty of murder in the first degree that Dr. Drayton was called upon to examine him. Of course the examination was skimpy as demonstrated by the dissenting opinion and the exhibition in court of watching a man and pronouncing him to be a "fake" was simply absurd.

The majority says "There is a fallacy, we believe, in the assumption that the psychiatrist was called upon by the court to prove Smith sane. He was called upon by the court at the suggestion of Smith's lawyers, to give the court the benefit of his professional opinion, and he did." This is misleading because it would indicate that this was the first request and that the appointment of Dr. Drayton was satisfactory to defense counsel.

Dr. Drayton was the court's witness. That is far different from, and it is not an effective substitute for a hearing either *in limine* or at some stage of the proceeding to determine mental competency. The court, having found petitioner guilty of murder in the first degree, was certainly going through with an idle gesture so far as "mental competency to be tried" or "criminal responsibility" was concerned.

The majority opinion indicates fear that if psychiatric assistance is afforded defendant will call for other help such as ballistics experts, chemists, biologists, etc. There simply is no analogy at all between the right of a man to have medical help on the issue of whether he is mentally competent to stand trial and the kind of collateral expert assistance referred to by the majority. Petitioner is not promoting a "battle of the experts" or advocating a "psychiatric circus". He is saying that he needed the assistance of the only kind of Doctor who understands his type of disease in this fight for his life. That is not asking too much.

Finally in the *McGarty* case the Court was fortified in its view (188 F. 2d 151 at 157) because "there has been no challenge of the professional standing and competence of the psychiatrists whose examination and report has been furnished at state expense, and no question has been raised as to their complete impartiality or as to the thoroughness of their examination of the accused."

The dissenting opinion has demonstrated that the examination in the instant case was not thorough and the present condition of senile dementia of the very psychiatrist relied upon by the Commonwealth to give assurance that due process was observed raises a serious question as to the competency as well as the thoroughness of the examination (see Affidavit p. 21 et seq.).

The trial court was without authority to accept the guilty plea.

It would be a disservice to repeat at length the long history of mental illness of petitioner and the fact that it was called to the attention of the court at every available opportunity.

The Petition for Habeas Corpus recited in the first nine paragraphs (Supplemental Appendix for Appellant,

pp. 4, 5) the history of the case prior to plea. The following four paragraphs appear in the margin.[14]

It is submitted that under those circumstances the court was without authority to accept a plea of guilty of murder on a conditional basis and to make an agreement with counsel that the court would consider withdrawal of the plea of guilty in accordance with what the hospital records might show. Cf. *Commonwealth v. Senauskas*, 326 Pa. 69.

A Guilty plea is a solemn confession of guilt which constitutes a waiver of trial by jury and justifies the court in imposing sentence. The agreement contemplated that the court would decide the issue of petitioner's mental capacity. But it had no legal authority to do so. The majority opinion of the court below says that the question of petitioner's "guilt *or lack of it* was open in the trial court until the judgment of guilty was entered and penalty fixed" and that petitioner was not "precluded from having *his whole case* considered by the three judges who constituted the trial court" (Opinion, p. 13, 192 F. 2d 548). (Emphasis supplied)

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14. "10. When, therefore, counsel were notified that trial had been fixed for September 21, 1948, they conferred with Honorable Charles L. Guerin, to whom the case had been assigned for trial, and Colbert C. McClain, Esquire, the Assistant District Attorney in charge. This conference occurred pre-trial, and the foregoing facts were revealed and counsel's and Relator's predicament was made known.

11. At such conference, counsel for Relator also mentioned their desire to have the trial court allow a petition to subpoena the records of the Brooklyn State Hospital, since they were material to the issue of Relator's sanity.

12. To preclude further delay, and it being agreed by the conferees that under Pennsylvania law, court-appointed counsel could not be provided with psychiatric examination and advice, it was further agreed between counsel, the District Attorney and the court that the plea be changed to 'Guilty', that the Commonwealth present its testimony on September 21st before a court en banc, that the case be then postponed sufficiently to allow counsel to subpoena the New York records, and that if these records, when introduced in evidence, raised an issue or doubt of Relator's sanity, the court would consider withdrawal of the plea of 'Guilty.'

13. Thereupon, Relator's plea was changed to 'Guilty' on September 21, 1948."

This cannot be so. The governing Pennsylvania statute in cases of murder is the Act of June 24, 1939, P. L. 872, Section 701, 18 P. S. 4701 (Supplemental Appendix to Brief for Appellant, p. 54a). After dividing murder into degrees and providing for power in the jury to fix the degree of murder, the statute continues "If such person is convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and, give sentence accordingly." The statute also provides "In cases of pleas of guilty, the court, after it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life." This constitutes the full function of a court in hearing a guilty plea. It has no right whatever to adjudge the defendant innocent, although it does have the undoubted right, in its discretion, to direct that the plea be withdrawn. But it has no power to judge "criminal responsibility" or "mental capacity to be tried." It did not have that power at common law and it has not been given it by statute. Indeed, the very idea of accepting a guilty plea and then deciding these questions is absurd.

The situation was dealt with in *Commonwealth v. Scovern*, 292 Pa. 26, where the Court said:

> "A person who, by reason of his insanity, is unable to comprehend his position and to make a rational defense cannot be tried on a criminal charge while in that condition. There must be reasonable grounds on which to base an inquiry as to insanity, and a method of ascertaining the fact. At common law, when the question of defendant's sanity at the time of trial was raised in any case, the preliminary question was for the trial judge within his legal discretion; the court, believing doubt exists, may order the fact to be tried *by a special jury impaneled for that purpose, or by the jury which is to try the indictment:* Webber v. Com., 119 Pa. 223." (Emphasis supplied.)

The State Supreme Court then considered various statutory provisions, including those that have been referred to in the present case. But, neither in this case nor in any other has the State Supreme Court said what the majority opinion below says, i. e., that a court en banc, organized to hear a guilty plea, has power to decide insanity. The trial Court was without authority to accept such a conditional guilty plea.

The Trial Court Adjudicated the Degree of Petitioner's Crime to be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question.

Nothing is better established than the common-law proposition that "He who decides anything, one party being unheard, though he should decide right, does wrong." 6 Co. 52; 4 Bl. Com. 483. Cf. *Snyder v. Massachusetts*, 291 U. S. 97, 116.

The majority opinion does not appreciate the reach of petitioner's point that his guilt of murder in the first degree was prematurely adjudicated. He contends not only that such adjudication was premature in that it was arrived at prior to hearing evidence on the question of his sanity but also it prevented consideration of his own testimony as to the merits of the case and the testimony of his other witnesses. He was expressly precluded from presenting any evidence *on the degree of his guilt* as well as his mental competency and was restricted only to the presentation of evidence as it might affect the kind of sentence to be imposed (Petition for Habeas Corpus, par. 33, R. 10; see also R. 76).

The plea of guilty admits guilt of murder in the second degree. *Commonwealth v. Iacobino*, 319 Pa. 65, 178 A. 823. If the Commonwealth seeks a judgment of a higher degree it must produce evidence which convinces the court as a matter of fact, beyond a reasonable doubt, that the crime

was murder of the first degree. Unless the judges are so convinced by the evidence then it is their duty to give judgment no higher than that of murder in the second degree.

The Commonwealth may raise the crime from second degree to first by showing either a wilful, deliberate, premeditated killing or a murder committed in the perpetration of one of the felonies named in the statute, such as robbery. (The Statute appears in full at Supplemental Appendix to Brief for Appellant, 54a.) The defendant's "confession" to the police admitted his purpose was to commit robbery (60a-63a). Hence the court could have found that it was murder in the first degree, provided it believed the "confession" was a voluntary statement from a man who was mentally competent to make it. It had made no inquiry on that point.

But whether petitioner was sane or insane and whatever the evidence was the Court had no right to come to any conclusion prior to hearing him or any evidence he was to produce. *Commonwealth v. Barrish*, 297 Pa. 160; 146 A. 553. It had no right to do this not only because it is the law but because such a specific agreement had been entered into between counsel and court. As a matter of fact, under all the evidence, it is a fair inference that there was no robbery motive at all. There was in fact no robbery or even an attempt unless the shooting itself were to be considered an overt act of robbery. The only evidence on this score is the confession of this petitioner. And the police admitted that there may have been many questions and answers not incorporated in the "confession" (66a).

Therefore, when the Commonwealth's evidence had been fully produced, it was still necessarily open as a question of fact whether the crime was murder of the second degree or murder of the first degree. The Commonwealth's evidence did not compel belief as a matter of law. That is the firmly established rule as to all oral testimony. *Nanty-Glo Boro v. American Surety Co.*, 309 Pa. 236; *Reel v. Elder*, 62 Pa. 308.

The dissenting opinion at p. 28 (192 F. 2d at 556) demonstrates by reference to the official records of this case that there can be no doubt that petitioner was adjudged guilty of first degree murder on September 21, 1948. These records are: (1) The original entries on the Bill of Indictment; (2) The official docket entries lodged with the Supreme Court of Pennsylvania on the original appeal (p. 2a) which are made up from the Bill of Indictment; (3) The Opinion of the Supreme Court of Pennsylvania on the main appeal (362 Pa. 223 at 223).

In addition to these the official record shows (76a) that the court on September 21, 1948, precluded the taking of any further testimony except in mitigation of sentence (76a). Here is what the court said:

> "After Recess.
>
> Judge Guerin: Gentlemen, we have taken the matter under consideration. We feel that there is but one announcement to be made at this time. The order requested in the petition will be made and the return day fixed for Wednesday, October 27th. In the meantime it will be understood that a written statement of the defendant's position will be embodied in the record stating that the purpose of the medical testimony sought to be secured from New York is simply in mitigation of the penalty, *and also any other testimony that may be offered by the defendant,* and have the statement signed by the defendant and by counsel.
>
> The case is continued to Wednesday, October 27, 1948, in This Room, at 10:00 o'clock A. M." (Emphasis supplied.)

The State Supreme Court treated the claim of petitioner as though it applied only to mental capacity and even then answered it only by circular reasoning. It conceded that the question whether he had been adjudged guilty of murder in the first degree on September 21, 1948 or on

February 4, 1949 is a fact in dispute (Supplemental Appendix for Appellant, p. 62, 364 Pa. at 96). But, said the Supreme Court, that issue is immaterial because the plea of guilty admitted petitioner's sanity and therefore no inquiry need be made into that question.

It held specifically that all evidence received thereafter as to mental capacity was so received only on the question of the kind of sentence to be imposed. Here is what the court said (Supplemental Appendix for Appellant, p. 46, 364 Pa. at 112):

> "When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate penalty to be imposed upon the defendant."

Clearly it appears, therefore, that the State Supreme Court having conceded that no inquiry was made as to sanity prior to acceptance of the plea of guilty and no evidence for that purpose was received thereafter was holding that no such finding was necessary at all.

But the court below proceeded upon an entirely different basis. With respect to the right to have a hearing on the question of mental capacity the court said (Opinion, p. 7, 192 F. 2d at 545):

> "Due process does not go so far as to require a hearing on mental condition in any particular manner or at any particular stage in the proceedings. Certainly it does not require a hearing in limine on the question as counsel for relator contend. The most that it requires, in our view, is an opportunity to have adequate hearing on the question before guilt is finally determined."

But, having said this, the majority opinion then says that the trial court actually did hear and dispose of the question. The Opinion says (p. 13, 192 F. 2d at 548):

> "Nevertheless, the question of his *guilt or lack of it* was open in the trial court until the judgment of guilty was entered and penalty fixed. The latter, at least, was not until February 4, 1948." (Emphasis supplied)

The majority also, after quoting part of the testimony, says (Opinion, p. 14, 192 F. 2d at 548):

> "These questions and the excerpts quoted above, together with the agreement under which the guilty plea was accepted, make it clear to us, without need of further evidence, that *the questions of guilt and ability to stand trial* were still open during the receipt of defendant's evidence relative to mental condition. The principal purpose of the evidence may have been to aid the court in determining penalty, but it was obviously considered on the merits of the *whole case* as well. A reading of the unpublished opinion of the trial court substantiates our conclusion.[15] It discloses that the court determined that Smith was sane both when he killed the cab driver and when he was tried." (Emphasis supplied)

It is submitted that the respective bases upon which the State Supreme Court and the majority below justify the action of the trial court are irreconcilable. The State Supreme Court holds that neither the question of sanity nor

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15. As a matter of fact, Petitioner submits that the opinion of the trial court (Appendix to Appellees' Brief, Exhibit 1) shows that the court considered this evidence simply on the question of sentence and indeed demonstrated also that it applied data which has no relevancy whatever to the problem of mental capacity to plead at the time he did so. The court said (p. 10): "We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing." Knowledge of the distinction between right and wrong has nothing to do with capacity to plead or cooperate with counsel.

of guilt was open after the plea of guilty. The court below holds that both were. The State Supreme Court holds that the medical evidence subsequent to guilty plea was considered only on sentence, but the majority below say that this is not so.

One thing is clear. Everybody agrees that the question of petitioner's mental capacity was not decided *before* the guilty plea. If the State Supreme Court was correct that no evidence on the point was received thereafter, then the majority of the court below, applying its own view of federal due process, would have to hold that petitioner's rights were violated. To reach its conclusion, therefore, the majority had to, and did, refuse to accept the State Supreme Court's version of what the *state* trial court did. It is submitted that it is not free to do that. Had the majority accepted the State Supreme Court's view of state action and applied its own view of federal due process it would have been forced to agree with the dissenting judges that petitioner was denied due process.

It is submitted further that the reasoning upon which the majority proceeded cannot be sustained. It cannot be true in any criminal case that a man's "guilt or lack of it" or his "whole case" is open after a plea of guilty is accepted. After such acceptance in a murder case only the degree of guilt and the nature of punishment is open, and, as has been demonstrated, in this case the question of the degree of petitioner's guilt was foreclosed prematurely on September 21, 1948 before any of his evidence was heard. At the very least, as the State Supreme Court said, this was a fact "in dispute". Even its materiality was disputed between the two courts. That is one of the reasons why there should be findings of fact.

The majority also says (p. 9) "A hearing was had September 21, 1948, in which the Commonwealth's evidence was introduced, it being agreed that further hearings would be had at which defendant could produce his evidence."

This sentence may mislead. It permits the inference that such an agreement was made on September 21, 1948.

Prior to September 21, 1948, it was agreed that the plea of Not Guilty would be withdrawn and a plea of Guilty entered and that on September 21, 1948, only the evidence of the Commonwealth was to be heard. But on September 21, 1948, contrary to the agreement, the court ordered that no testimony thereafter of any kind whatever would be considered except on the question of penalty. This though the defendant himself had not yet testified nor had it come time for him to testify (R. 76a).

When petitioner took the stand on November 5, 1948, this record demonstrates his incapacity to complete his testimony. A mere reading of the proceedings on that day is enough to capture the spirit in which this case was conducted (166a-190a).[16]

When it was obvious that petitioner could not testify the court made the virtually unprecedented ruling that counsel could tell his story for him while he held his hand on the Bible (185a). Counsel did tell the story for him and in effect contradicted that there was any such robbery. This was entitled to be considered not merely on the issue of penalty but also on the issue of guilt of murder in the first degree. But it could not be so considered because the court had already decided that it was murder in the first degree.

Furthermore, some of the testimony of petitioner's witnesses well might have affected the decision of the court on the degree of the offense.

In fact, the evidence with regard to petitioner's mental history had obvious bearing on the issue of whether he could form the specific intent to rob or the specific intent

16. The trial court says in its opinion (p. 4, Appendix to Appellees' Brief, Exhibit 1): "Defendant took the witness stand and answered a number of questions put to him by his counsel concerning his childhood and his period of service in the army, but when questioned about the events of the night before, and the morning Haines was shot, he remained silent, despite the repeated efforts of his counsel and the several members of the court to elicit a reply. Defendant constantly kept his chin on his chest, twisted his mouth, wet his lips, clenched and unclenched his hands and squirmed about on the witness chair. So pronounced was his conduct that the court requested Dr. Drayton to sit in front of the court room and observe the defendant. The court permitted counsel for defendant to state the result of their investigations and interviews with defendant."

to kill, one of which had to be found in order to support a finding of first degree murder. Together with the other evidence it warranted a finding that petitioner's "confession" was unworthy of belief for the reason that petitioner was mentally incompetent to give an accurate statement. Thus Mildred Wheeler testified as to petitioner's condition before the occurrence, that he appeared to be dopey and appeared to her as though he had been smoking marihuana (192a); his mother, Elsie Easton, testified that she had seen her son, the petitioner, in the same condition as he appeared in the courtroom on previous occasions (i. e., his "exhibitionism") (198a); Margaret Smith, a sister of petitioner, testified that not only was he an habitual drunkard but that he smoked reefers (marihuana) (205a).

With the robbery motive absent it would have been incumbent upon the court to have found that the murder was wilful, deliberate and premeditated else it could not have been said to have been murder in the first degree. Apparently no such finding was made but the adjudication of first degree murder was based only upon the finding that the killing occurred while defendant was perpetrating a robbery. Petitioner was therefore deprived of one of the most fundamental of all his rights—the right not to be condemned until his evidence was received and carefully considered.

It is of no consequence that after September 21, 1948, when the court foreclosed further inquiry as to the degree of the offense, petitioner may not have in fact produced important evidence other than that noted above which would go to the degree. Indeed, it is not invalid to presume that no attempt was made to do so because of the very fact that the court had foreclosed such inquiry.

The majority assumes that the only issue raised was whether or not the plea of guilty should have been permitted to be withdrawn. That entirely misses the issue. Even on that point the court says "There is no indication that any such motion or suggestion was ever made on be-

half of the prisoner." This flies in the face of the record.

He specifically averred (Par. 26 (d) of the Petition) that the testimony on the first petition in the District Court established "The trial court refused to permit Relator to withdraw his plea of 'Guilty' so that he could have the issue of his sanity determined."

And in Par. 32 it was specifically averred:

> "It is averred that the trial court committed substantive error, in derogation of Relator's rights under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, when it permitted the plea of 'Guilty' to bind the Relator and gave judgment thereon, and failed to order said plea to be withdrawn, so that the issue of his sanity could be determined."

Curiously enough the majority quotes from the record as though one of the Judges was urging that the plea of guilty be withdrawn, or at least was affording an opportunity for so doing, and that counsel for petitioner was refusing it. Precisely the opposite is the fact. Properly read it is seen that it was counsel for petitioner who was urging that there was a real issue as to his mental competency which should be decided not informally but formally. Any other conclusion makes the situation ridiculous because it would indicate that the same Mr. Levin who had filed petitions for lunacy commissions, had asked for the appointment of a psychiatrist and had attempted to get the medical records from New York was attempting now to convince the court that the plea of guilty was proper and the court was taking the position that it was not. For Judge Guerin, in response to Mr. Levin's question quoted by the majority "Does that satisfy any uncertainty which your Honors may have had in regard to the withdrawal of the plea? said "It does not to my idea." "Mr. Levin: I think it raises an issue, sir. Judge Sloane: I am certainly of the opinion now he was sane and lucid in October of 1945." If

this means that Mr. Levin was taking the position that the plea of guilty was properly entered it would indicate that Judge Guerin, before whom it was entered, was taking the position that it was not properly entered. Certainly, if that view of the case is correct, it was the duty of Judge Guerin to insist upon its withdrawal.

The majority again repeats the error of saying that at the last hearing, when the testimony of Dr. Drayton, the psychiatrist was received, "the questions of guilt and ability to stand trial were still open during the receipt of defendant's evidence relative to mental condition." Not even the State Supreme Court agreed with this.

The majority then says that since Smith was found to be sane when he killed the cab driver "That being so the only conclusion possible for the court to draw was guilt of first degree murder." That is not so at all. It could not draw such a conclusion unless it believed his confession. It could not believe that confession unless it found that he was mentally competent to make it. And in any event, it could not come to that conclusion on September 21, 1948, after it had heard only one side of the case.

Even a casual study of the photostat attached to the Dissenting Opinion below shows the limit to which someone was willing to go to have this judgment not disturbed. The false entry on that indictment will itself be an indictment of Pennsylvania criminal justice as long as the Federal Reporter is read (192 F. 2d at 569). Who did it? When? Why? One should think that the Commonwealth would clamor for a hearing instead of trying to prevent one.

The Trial Court Did Not Adjudicate Mental Competency or Receive Relevant Evidence on That Issue.

Petitioner pleaded Not Guilty on February 25, 1948. He has argued above that thereafter he lost the valuable right to have his mental competency (to plead or to be tried) determined by a jury trial and was denied all other

pre-trial statutory procedures whereby the question could be determined. On September 21, 1948 he pleaded Guilty.

The majority opinion of the court below holds that it was necessary to due process that the trial court decide the question of mental competency prior to judgment. The opinion then says that this question *was* decided prior to judgment. It is submitted that the following proposition stated in the dissenting opinion cannot be gainsaid (p. 44, 192 F. 2d at 564): "An essential underlying principle is that if a court proceeds to an inquiry as to whether an accused is sane or insane and reaches a judgment in that inquiry, it must do so on sufficient probative data".

As the dissenting opinion points out, ordinarily the question whether a court proceeded to judgment upon sufficient evidence raises only a question of legal error not within the reach of habeas corpus. If the question is whether a plaintiff shall recover, recovery may be granted only upon sufficient probative data. But even if a mistake is made, the result is mere error. But where the question is jurisdictional and depends upon a fact, and the court proceeds to decide that essential question of fact without sufficient relevant data, the result is not mere error.

Here, if petitioner was insane in the sense that he did not have the mental capacity to plead, then the court had no jurisdiction to hear his case. Therefore, if the court decided that jurisdictional fact upon completely irrelevant and non-probative data there was no legal adjudication of a fact upon which jurisdiction depended.

The majority opinion holds that Dr. Drayton's examination and testimony on November 5, 1948 fulfilled the requirement of due process. The data which is relevant to the question whether petitioner could plead or be tried was whether he could rationally advise with his counsel and assist in his own defense. *Commonwealth v. Scovern*, 292 Pa. 26, 29. That inquiry was not made by Dr. Drayton. No question was asked or answered which went to that crucial

issue. The whole of Dr. Drayton's testimony on direct examination is printed in the margin.[17]

The only direct inquiry made of Dr. Drayton as to the formula applied by the trial court occurred in the questioning of one of the judges.

"By JUDGE CARROLL:

Q. In your professional opinion was this man, on January 15, 1948,[18] capable of distingishing between right and wrong?

A. I believe he was.

Q. Was he capable of understanding what he was doing on his own part?

A. I believe so.

Q. As of this date is this man capable of distinguishing between right and wrong in your opinion?

A. I believe he is."

Thus it is seen that the proper legal test was not applied at all. As the dissenting opinion so beautifully states, the so-called M'Naghten formula, i.e., the right and wrong test,

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17. "A. This man is of average mentality. He has a history of mental illness, diagnosed schizophrenia, catatonic type, for which he was treated at Kings County Hospital on May 16, 1945, to June 12, 1945, discharged recovered October 11, 1945. Also at the Philadelphia General Hospital psychopathic ward, from December 27, 1945, to January 4, 1946. Diagnosis: Alcoholic hallucinosis. Smith had been drinking heavily, said that he felt an urge to kill and asked the polce to take him to the Naval Hospital. He was not admitted there but was sent to the Philadelphia General Hospital. I read his confession to him. He says that he does not remember anything about it, does not remember stealing an automobile in New York but does remember being in the Kings County Hospital. He does not remember being in a Reformatory in New Jersey.

The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines."

I asked him if he had been smoking reefers and he says, 'I always smoke them.' I said, 'Did you smoke them before you committed the crime' and he said, 'I always smoke them but don't remember committing the crime.' He didn't remember making a confession. He appeared to have a very convenient memory loss. He has no psychosis.

Q. What is your diagnosis?

A. He is of average intelligence, no psychosis; psychotically and neurologically negative."

18. The date the petitioner killed the cab driver.

ought not now to be applied even to the question of criminal responsibility. But, it never had and certainly does not now have any relevancy or probative value to the question of mental competency to plead which confronted the trial court.

It seems clear, therefore, that the majority opinion below was in error in saying that the trial court adjudicated petitioner's mental capacity. Not only did it not have "sufficient probative data," it had none at all. This being so it never determined a question of fact upon which jurisdiction of this petitioner depended. Its judgment of sentence is therefore a nullity.

The Supreme Court of Pennsylvania Not Only Failed to Correct the Denial of Procedural Due Process by the Trial Court in the Main Trial, But Itself Denied Procedural Due Process in This Proceeding. It Did Not Adjudicate Petitioner's Claim of Deprivation of Federal Rights.

An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering a judgment. *Chase-Hibbard M. Co. v. City of New York,* 64 N. Y. S. 681, 31 Misc. 559, 560; *State v. Huhn,* 346 Mo. 695, 700, 142 S. W. 2d 1064, 1066; *Genzer v. Fillips,* 134 S. W. 2d 730, 732.

Although the Supreme Court of Pennsylvania wrote a lengthy opinion it rejected petitioner's averments of fact without giving him an opportunity to prove them. There was no "hearing upon an issue". There was no "receiving of evidence". There was no "weighing of evidence". This could be justified only if the petition was improper from a procedural viewpoint or was not sufficient on its face to prove violation of Federal rights.

Petitioner filed an original petition for a writ of *habeas corpus ad subjiciendum* in the Supreme Court of Pennsylvania. Constitution of Pennsylvania, Art. V, sec. 3; *Williamson v. Lewis,* 39 Pa. 9; *Commonwealth v. Heston,* 292

Pa. 63, 140 A. 533. This is an appropriate proceeding under Pennsylvania law to test questions of the type presented. *Commonwealth ex rel. Milewski v. Ashe*, 362 Pa. 48, 66 A. 2d 281; *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35, 63 A. 2d 77; *Commonwealth ex rel. Piccirelli v. Smith*, 150 Pa. Super. 105. The averments of that sworn petition, if true, showed that the trial Court, by violating the fundamental federal rights of Petitioner, during its proceedings *lost* its jurisdiction to proceed to judgment. *Bowen v. Johnston*, 306 U. S. 19, 23, 24, 59 S. Ct. 442.

The Pennsylvania Supreme Court itself judicially determined not only that the petition was procedurally correct but that it stated a prima facie case. It did this by granting a rule upon the Commonwealth to show cause why the writ should not be granted (R. 13). This practice is a permissble alternative to the immediate issuance of the Writ itself. *Commonwealth ex rel. McGlynn v. Smith*, 344 Pa. 41, 24 A. 2d 1; see also *Walker v. Johnston*, 312 U. S. 275, 61 S. Ct. 574.

Had it not so determined, it would have dismissed the petition without even granting the rule. See *Commonwealth ex rel. McGlynn v. Smith*, 344 Pa. 41, 47, 24 A. 2d 1; *Commonwealth ex rel. Milewski v. Ashe*, 362 Pa. 48, 50, 66 A. 2d 281. Since, therefore, the facts, if true, warranted relief, it is submitted that petitioner was, as a matter of right, entitled to an opportunity to prove that they were true.

The Supreme Court of Pennsylvania denied that opportunity to petitioner. See *Pyle v. Kansas*, 317 U. S. 213, 216, 63 S. Ct. 177; *Cochran v. Kansas*, 316 U. S. 255, 62 S. Ct. 1068; *Rice v. Olson*, 324 U. S. 786, 65 S. Ct. 989. It held no hearing whatever nor did it refer the case to any tribunal to take testimony. No facts were found nor legal argument had on any agreed state of facts.

Instead, the court assumed the *untruth* of some of the crucial allegations and disposed of the whole question on matters which were not of record. The court says in a

footnote to its Opinion (364 Pa. 93, 96, fn. #2): "Habeas Corpus proceedings in behalf of Smith were begun in the United States District Court at Philadelphia, and on October 4, 1949, testimony was taken there. With the acquiescence, at Bar, of the respective Counsel, this testimony was made a part of the record of the proceeding here". This is simply not so. This statement is made without any basis whatever, either of fact or law. A habeas corpus petition *was* filed in the United States District Court and testimony was taken in that Court, but the record of this case in the Pennsylvania Supreme Court not only does not show any "acquiescence" of Counsel that such testimony be made a part of this record, but, on the contrary, conclusively demonstrates the opposite.

The record shows that petitioner's counsel at the very beginning called the attention of the Supreme Court of Pennsylvania to the fact that it would be improper to dispose of the case upon petition and answer (R. 55-57). Both orally at Bar and in a brief filed contemporaneously with oral argument, he stated his objection to proceed in that fashion (R. 55-57). Some time thereafter, but prior to decision, petitioner's counsel filed a brief of law with the court and again called to the attention of the court the necessity of a hearing before a member of that court or that the matter be sent back for hearing before one of the judges of the lower state court (R. 56, 57).

The next thing that happened was that the Supreme Court filed an Opinion, refusing the petition for writ of habeas corpus without having held any hearing before any member of that court, or, indeed, any hearing before any judge or even on depositions. In that Opinion, as originally filed, the Court, speaking of the testimony previously taken in the United States District Court, recited that "by agreement, this testimony was made a part of the record of the proceeding here" (R. 54).

Upon receipt of a copy of that Opinion, counsel who had orally argued the matter before the Supreme Court of

Pennsylvania, filed his sworn petition for reargument, stating unequivocally that this statement of the Opinion was untrue and unsupported by the record or the facts (R. 54). The Commonwealth filed no answer whatever. It has never denied the averments of this petition for rehearing. Not even in the present proceeding were those averments contradicted by anybody.

Thereupon the Supreme Court simply changed the language of footnote 2, which in the original Opinion indicated that the court considered the testimony given in the District Court "by agreement of Counsel" to "by acquiescence of Counsel" (364 Pa. 93, 96, fn. #2).

It is submitted that Counsel for the absent petitioner would not and could not bind him by any such action. Counsel properly could not have "agreed" much less "acquiesced" that conflicting testimony taken in a Federal Court be made the basis for decision by a State Appellate Court on an issue of life or death where none of the Justices of the Appellate Court ever saw or heard the witnesses and where no procedure was used whereby findings of fact on disputed testimony could be made by any Pennsylvania tribunal. Petitioner was not even in Court (R. 13).

The State Supreme Court, speaking of the proceeding in the United States District Court, says (364 Pa. 93); "In that hearing these facts were brought out * * *" but there was no finding of facts by the District Court en banc. The judge who heard the testimony held that petitioner was badly overreached. See dissenting opinion 87 F. Supp. 339. The other members of the District Court on the original petition never reached the merits and disposed of the petition on territorial jurisdictional grounds. Even the Supreme Court of Pennsylvania did not make findings of fact. The above quotation shows that this is so, and besides there was no way for the justices of that court to make findings of fact. There was much testimony and many issues raised by that testimony in the District Court to which the Opinion of the Supreme Court does not even

refer. The Opinion simply picks and chooses from that testimony certain bits of evidence which it quotes as comporting with its ultimate conclusion. If that whole testimony *were* part of this record, a fair reading of it would support petitioner's contentions.

Such "acquiescence" could not confer upon the Pennsylvania Supreme Court jurisdiction to act upon conflicting testimony taken in a court of a foreign jurisdiction, particularly where such foreign court held itself to be without even territorial jurisdiction.

Petitioner's brief as to the facts he expected to be able to prove, which was filed contemporaneously with the oral argument (R. 55) and his brief on questions of law, which was filed thereafter but prior to decision, ought to have eliminated any such question of "acquiescence".[19] Even after the Opinion of the Supreme Court was filed and counsel, upon his oath, challenged the correctness of the statement that he had agreed to have this writ decided without findings of fact upon which the law could have been declared, the court was under a duty to proceed in accordance with law to have the facts determined instead of insisting upon a non-existent "acquiescence".

If this were not enough, surely the Supreme Court of Pennsylvania had to afford a hearing when petitioner, formally of record, challenged on procedural due process grounds the right of the court to deny him one (R. 54 et. seq.).

It is submitted, therefore, that the Supreme Court of Pennsylvania was under the duty to determine the application for the writ in a fundamentally fair way by having the petitioner's allegations found to be true or untrue by some Pennsylvania tribunal in accordance with law. Not only, therefore, did the Supreme Court of Pennsylvania fail to redress the denial of due process which occurred in the

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19. These briefs as to these matters are of "Record" by the petition for re-hearing (R. 54).

lower Pennsylvania Court, but it too denied procedural due process to this petitioner. It "adjudicated" nothing.

The majority opinion of the court below holds that since the testimony taken in the District Court was "referred" to in the petition for the writ "it can hardly be lack of due process for the Supreme Court to refer to the testimony when the relator himself did so." First of all, petitioner referred to that testimony to show that there was substance behind his allegations, that is to urge the Supreme Court of Pennsylvania to grant him a hearing. Secondly, the mere reference to that testimony and conclusions drawn from it certainly does not authorize the Supreme Court of Pennsylvania to procure, in a way still unknown to petitioner's counsel, one copy of that testimony and proceed to pick and choose from it and to base conclusions upon it. Referring to it is one thing but for an opinion writer to misconstrue it and treat it as having established "facts" which are utterly at variance with the petition is quite another.

Lastly, on this point, counsel for petitioner never knew that the court had that record or was considering it. He never had an opportunity to argue it orally or to brief it. The record shows by his uncontradicted affidavit that it came as a surprise to him when the court's opinion showed that it had possession of a copy of it. Had he known that he would have been able to register additional objection before decision or if necessary to argue on the basis of that testimony. Due process requires fair opportunity to argue both law and facts and to know what data is being considered. Petitioner was overreached by the Supreme Court of Pennsylvania.

The District Court Should Have Heard the Petition.

Since the state court did not permit petitioner to prove his averments both courts below are duty bound to accept as true all his well pleaded allegations and to examine for themselves whether under the facts stated petitioner is

entitled to a hearing on the claimed violations of the due process clause. *Hawk v. Olson*, 326 U. S. 271, 273; *Lisenba v. California*, 314 U. S. 219, 237; *White v. Ragen*, 324 U. S. 760.

Habeas corpus is a proper proceeding in a federal court to test whether a state has violated the Federal Constitution even if the events alleged to constitute infringement had not appeared upon the face of the record of the conviction. *Frank v. Mangum*, 237 U. S. 309, 331; *Hawk v. Olson*, 326 U. S. 271, 274.

In *Hawk v. Olson*, 326 U. S. 271, this Court said "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

It was the presiding justice of the Third Circuit whence this case comes who said in dissent in *Louisiana v. Resweber*, 329 U. S. 459, 472 "Where life is to be taken, there must be no avoidable error of law or uncertainty of fact."

The judge who received this petition granted a rule to show cause why it should not be granted but then all the judges of the District Court assembled *sua sponte* to hear the case. Petitioner now, even if belatedly, questions the power of the District Court judges to do this.[20]

Petitioner's counsel made no objection at the time or even when the case was argued in the Court of Appeals.[21] However, he makes it now on the ground that if the District Court has no authority to assemble en banc to decide a petition for writ of habeas corpus his consent, whether by waiver or otherwise, cannot confer such power upon them.

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20. The judge who heard the evidence originally wrote a dissenting opinion in which he agreed with Petitioner's contention, on the second petition he granted the rule and again dissented.

21. Petitioner, of course, does not challenge the right of the court of Appeals to assemble the full court to hear the appeal.

Conclusion.

Petitioner is asking for certiorari to review the denial of his asserted right to have a hearing and decision by some court some time before he dies on the question whether the State of Pennsylvania condemned him to death and proposes to execute him in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

No court, state or federal, has adjudicated his claim in the sense that it has found the facts and tested those facts by applying the standards required by the Fourteenth Amendment. At every turn of the road Pennsylvania has successfully prevented an adjudication of the facts.

The seven judges of the District Court for the Eastern District of Pennsylvania thought the questions involved were so important that they heard them en banc. The majority of four held that the court had the right to exercise discretion and then proceeded to exercise it against petitioner. The minority of three believed that the petition presented a prima facie case, that the record was not clear that Pennsylvania had ever adjudicated that case on its merits and that it was the duty of the federal court to do so.

On appeal the Court of Appeals thought the issues to be of such paramount importance that the Court, of its own motion, assembled en banc. The result numerically was a repetition of what happened in the District Court but upon different reasoning. The majority four judges disagreed with the District Court on its right to exercise discretion but affirmed the decision on the ground that it was right as a matter of law. The minority of three judges agreed that the District Court was without discretion but held that the Petition and all relevant records which the Court was entitled to consider demonstrated that in six separate and distinct ways Pennsylvania had violated petitioner's federal right to due process of law.

Presently the posture of this case is that petitioner has exhausted all state remedies and the questions for decision are whether on the data which the Court is legally entitled to consider he is of right entitled to an adjudication on the merits, including findings of fact and decision by a federal court on his claim of violation of federal rights.

Respectfully submitted,

HERBERT S. LEVIN,
THOMAS D. MCBRIDE,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

~~MISCELLANEOUS DOCKET No. 300~~

No. 31

UNITED STATES OF AMERICA ex rel JAMES SMITH,
Petitioner,

v.

DR. FREDERICK S. BALDI, Superintendent,
Philadelphia County Prison

BRIEF OF THE DISTRICT ATTORNEY FOR THE CITY AND COUNTY OF PHILADELPHIA

RICHARDSON DILWORTH,
District Attorney.

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OPINIONS BELOW.

The opinions of the Court of Appeals are reported at 192 F. 2d 540 and 192 F. 2d 549. The opinion of the District Court is reported at 96 F. Supp. 100.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 26, 1951. The petition for a writ of certiorari was filed January 15, 1952, and was granted March 24, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether on the facts alleged in the petition for a writ of *habeas corpus* in the District Court, petitioner was overreached and denied due process of law.

(2) Whether the District Court erred in not determining these facts.

STATEMENT.

The facts involved in this case are sufficiently stated in the two opinions of the court below (192 F. 2d 540 and 192 F. 2d 549) and need not be repeated here.

ARGUMENT.

I.

The District Attorney for the City and County of Philadelphia Has Standing to Present Arguments in this Case to this Honorable Court.

The District Attorney for the County of Philadelphia is the duly elected law enforcement officer of that subdivision of the Commonwealth of Pennsylvania. The trial of the present case took place in Philadelphia County and was prosecuted solely by its District Attorney. District Attorney John H. Maurer's appearance or that of one of his Assistant's was entered on behalf of the Commonwealth at every stage of the proceedings up to and including those in the court below. Likewise, District Attorney Maurer's name or that of one of his Assistant's appears on all of the papers for the Commonwealth in every stage of the proceedings. The Attorney General of Pennsylvania has not superseded the District Attorney of Philadelphia in this case.

II.

The District Court Committed Error by Not Receiving Evidence and Determining the Facts Necessary for a Proper Application of the Constitutional Law Involved.

It is submitted that the reasoning and statements of applicable law contained in the dissenting opinion of Chief Judge Biggs, joined in by Circuit Judges McLaughlin and Staley (192 F. 2d 540, 549-569), are valid and sound and should have governed the disposition in the court below of the issues now raised before this Court. It is the opinion of the present District Attorney of Philadelphia that if the allegations of the appellant, as contained in his petition for a writ of *habeas corpus*, are true, he has been overreached and denied due process of law.

It is clear from the record, that the issues of fact raised by the petition for a writ of *habeas corpus* have not been determined either by the Supreme Court of Pennsylvania or by the United States District Court. Since, substantial issues of Federal constitutional law are raised, it was incumbent on the District Court to determine the facts.

CONCLUSION.

It is, therefore, respectfully submitted that for the reasons contained in the dissenting opinion of Chief Judge Biggs the judgment should be reversed and the cause remanded with instructions to the District Court to make findings of fact necessary for the proper determination of the Federal questions involved.

Respectfully submitted,

RICHARDSON DILWORTH,
District Attorney.

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IN THE

Supreme Court of the United States

October Term, 1951

No. ~~600~~ 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,
Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals
for the Third Circuit.

BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 669

United States of America ex rel.
James Smith,
Petitioner,

v.

Dr. Frederick S. Baldi, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

OPINIONS BELOW

1. The opinion of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania (211a-227a; 1a-20a, Appx. to Respondent's Brief) is not reported.

2. The opinion of the Supreme Court of Pennsylvania affirming the judgment and sentence of the Court of Oyer and Terminer of Philadelphia County is reported in 362 Pa. 222, 66 A. 2d 764.

3. The opinion of the District Court at M-1334—the first application—is reported in 87 F. Supp. 339.

4. The opinion of the Circuit Court of Appeals affirming the dismissal of the application at M-1334 is reported in 181 F. 2d 847.

5. The opinion of the Supreme Court of Pennsylvania, dismissing the petition for a writ of habeas corpus, is reported in 364 Pa. 93, 71 A. 2d 107, cert. den. 340 U. S. 812.

6. The opinion of the District Court, in this proceeding—the second—is reported in 96 F. Supp. 100.

7. The opinion of the Circuit Court of Appeals, affirming the dismissal of the application, is reported in 192 F. 2d 540.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 26, 1951. The petition for a writ of certiorari was filed. The petition was granted on March 24, 1952. The jurisdiction of the court is invoked under Section 1254(1) of The Judicial Code, 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a district court should entertain an application for a writ of habeas corpus by a person in custody pursuant to a state criminal judgment where the records in the trial, appellate and collateral proceedings, reveal that

(1) The applicant was represented in the trial and appellate proceedings by skillful and competent counsel;

(2) The issues presented by the application were apparent on the face of the record and could have been, but were not, raised in the appellate proceedings; and

(3) The issues presented by the application had been presented to the highest State court in a collateral habeas corpus proceeding, had been adjudicated by that Court, and this Court declined to review the judgment of the State court.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE JUDICIAL CODE, 28 U.S.C.

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the

district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

"§ 2243. Issuance of writ; return; hearing; decision

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

"§ 2254. State custody; remedies in State courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has ex-

hausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT [1]

This is an application for a writ of habeas corpus by a person under a sentence of death pursuant to a judgment of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania at No. 384 February Term, 1948 (227a), opinion (211a-227a), affirmed by the Supreme Court of Pennsylvania, opinion reported at 362 Pa. 222, 66 A. 2d 764.

Following a denial of commutation of sentence by the Pennsylvania Board of Pardons on September 21, 1949, an oral application for a writ of habeas corpus was made to Honorable George A. Welsh, District Judge, United States District Court for the Eastern District of Penn-

[1] As used herein, the legend (a) indicates the page at which the information may be found in the printed records before the Supreme Court of Pennsylvania at No. 137 January Term, 1949, sub nom **Commonwealth of Pennsylvania v. James Smith, Appellant**, opinion reported at 362 Pa. 222, 66 A. 2d 764. The legend (N.T.) indicates the page at which the information may be found in the testimony taken before District Judge Welsh in the first proceeding at M-1334, sub nom **United States of America ex rel. James Smith v. Warden of Western State Penitentiary.**

sylvania, on September 24, 1949. District Judge Welsh issued a rule to show cause and a stay of execution and directed the respondent, the Warden of the Western Penitentiary, to produce the petitioner before the Judges of the United States District Court for the Eastern District of Pennsylvania on October 4, 1949. Prior to the issuance of the order, the petitioner had been removed from the Philadelphia County Prison to the electrocution building of the Western Penitentiary,[2] located in Centre County, Pennsylvania, which is within the territorial jurisdiction of the United States District Court for the Middle District of Pennsylvania.

After argument before all the judges for the Eastern District, the Court directed that testimony be taken before District Judge Welsh on the issues presented by the petition.[3]

Thereafter, the District Court dismissed the writ on the grounds that when the written petition was presented to the Court, neither the pe-

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[2] Section 4, Act of June 19, 1913, P. L. 528, 19 Purdon's Penna. Stat. Annotated, Section 1124.

[3] Trial defense counsel testified for the petitioner. Judges Guerin, Sloane and Carroll, who had heard the evidence on petitioner's plea of guilty, and Doctor Baldi, Superintendent of the Philadelphia County Prison, one of the respondents herein, testified for the respondent.

titioner nor his custodian was within the jurisdiction of the District Court for the Eastern District, opinion reported at 87 F. Supp. 339. District Judge Welsh dissented. The Circuit Court of Appeals affirmed, opinion reported at 181 F. 2d 847.

In the interim between the decisions by the District Court and the Circuit Court of Appeals, an application for a writ of habeas corpus was made to the Supreme Court of Pennsylvania at 302 Misc. Docket No. 9, Eastern District (R. 4-12, No. 818 October Term, 1949, Supreme Court of the United States, transferred to No. 70 October Term, 1950) attacking the constitutional validity of the judgment on the same grounds asserted in the instant proceeding (par. 1, 2a, Appx. Appellant's Brief in the Court below). The respondents filed an answer, in which the proceedings in the District at M-1334 were specifically incorporated therein by reference (par. 1, p. 17, Tr. R. at No. 818 October Term, 1949—Supreme Court of the United States, supra). The return of the Warden of the Western Penitentiary, a copy of which was served on petitioner's counsel, was accompanied by copies of the records in all of the prior proceedings, including the testimony taken before District Judge Welsh at M-1334 (30a, Appx. to Respondent's Brief). After argument before a majority of

the Supreme Court of Pennsylvania (Maxey, C.J., and Stern, Stearne and Jones, JJ.)[4] the petition was refused, opinion reported at 364 Pa. 93, 71 A. 2d 107.[5]

A petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania dismissing the petition for writ of habeas corpus was filed in this Court at No. 818 October Term, 1949, transferred to No. 70 October Term, 1950, and denied on October 9, 1950 (340 U. S. 812). Within a matter of a very few hours (par. 2, 2a, appx. Appellant's Brief in the Court below) a *second* application for a writ of habeas corpus was made to District Judge Welsh who again issued a rule to show cause and a stay of execution (19a. appx. Appellant's Brief in the Court below). The Attorney General of Pennsylvania filed an answer in which the prior proceedings were "specifically incorporated by reference in this proceeding" (par. 1, 21a appx. to Appellant's Brief in the Court below) and

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[4] 364 Pa. 94, 71 A. 2d 108.

[5] "In the instant case we find nothing in this record which convinces us that this relator was insane when he committed the murder charged or when he pleaded guilty or at the time he was sentenced to death. The relator has not in any stage of the proceedings been denied due process of law. The petition for writ of habeas corpus is refused." (364 Pa. 119; 71 A. 2d 120.)

two petitions—one joining the Warden of Western Penitentiary as a party respondent (34a appx. to Respondents' Brief), and the other requesting that a full bench be convened (66a, id.). The first petition was granted[6] and the other denied.[7]

The District Court, in an opinion by District Judge Bard, joined in by Kirkpatrick, Chief Judge, and McGranery and Grim, District Judges, opinion reported at 96 F. Supp. 100, declined to entertain the application on the ground that all the issues presented in the petition had been raised in and decided by the Supreme Court of Pennsylvania in the application for a writ of habeas corpus in that Court, and, since this Court had declined to review the judgment of the Supreme Court of Pennsylvania, it would be unseemly for the District Court to do so. District Judges Welch, Ganey and Clary dissented (87 F. Supp. 105).

The Circuit Court of Appeals, in an opinion by Goodrich, Circuit Judge, joined in by Maris,

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[6] The opinion of the District Court would indicate that the caption was amended to include the Warden of Western Penitentiary. Petitioner, however, did not take cognizance of this either in the Court below or in this Court.

[7] 96 F. Supp. 101.

Kalonder and Hastie, JJ., reported at 192 F. 2d 540, affirmed the judgment of the District Court on the ground that the petition did not state a cause of action. Chief Judge Biggs and McLaughlin and Staley, JJ., dissented (192 F. 2d 549).

This Court granted certiorari.

FACTS

The petitioner, James Smith, was indicted in the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, for the murder of John Haines, a taxi driver, on January 15, 1948. Herbert S. Levin, Esquire, a member of the Philadelphia Bar, was, on the day prior to petitioner's arraignment, retained by his family to represent him. The petitioner, however, was arraigned on February 25, 1948, before Mr. Levin had either entered his appearance or informed the Commonwealth of his representation of the appellant, and, upon advice of court appointed counsel, a plea of **not guilty** was entered to the indictment and a continuance granted.

As a result of interviews with the petitioner and members of his family, Mr. Levin ascertained that the petitioner had, in 1945, been confined in a mental institution in the State of New York, and, prior thereto, had been treated for a mental disorder while serving in the Armed Forces of the United States. He, Levin, claims to have zealously and industriously, but unsuccessfully, endeavored to procure copies of **records** from the Brooklyn State Hospital, Brooklyn, New York, and the United States Army authorities with respect to the appellant's prior mental history.

The indictment was listed for trial before Sloane, J., on March 17, 1948 (N.T. 194), but was postponed to the April Trial Term, on counsel's application, for the reason that he had not been able to secure the desired evidence from New York State (N.T. 195), at which time, counsel suggested the appointment of a commission under Section 308 of the Mental Health Act of 1923, Act of July 11, 1923, P.L. 998, as amended, 50 Purdon's Penna. Statutes Annotated Section 48, to examine the appellant. Judge Sloane called counsel's attention to a decision, presumably **Commonwealth v. Dunn,** 47 D. & C. Reps. 685 (1943), per Sloane, J., in which it had been ruled that, under the foregoing statute, only officers in charge of the institution where the prisoner is being detained are

proper petitioners.[8] Accordingly, Judge Sloane informed counsel that he would contact Dr. Frederick S. Baldi, physician at the Philadelphia County Prison, concerning possible institution of proceedings under under Section 308 of the Mental Health Act of 1923, supra (N.T. 195-196), which he did. Dr. Baldi, however, was of opinion that the petitioner was **not insane** and, therefore, refused to request the appointment of a commission to investigate his sanity (N.T. 199).[9] On March 19, 1948 (3a), a petition (228a-231a) was presented to Flood, J., who was then presiding in Current Motion Court, for the appointment of a commission to inquire into the petitioner's mental condition. The petition was dismissed on April 2, 1948 (3a), for the reason that the petitioner (counsel) was not a proper party petitioner. The indictment was then listed for trial on April 20, 1948 (N.T. 216), before Kun, J. Having been unable to secure the desired evidence from the mental institutions in the State of New York, and having concluded that he had done all he could do in the circumstances

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[8] See also, **Commonwealth v. Barnes**, 280 Pa. 351, 124 A. 636 (1924); **Commonwealth v. Green**, 346 Pa. 172, 174, 29 A. 2d 491 (1943).

[9] Mr. Chief Justice Maxey in his opinion in **Commonwealth ex rel. Smith v. Ashe et al.**, supra, at p. 115 of 364 Pa. observed that mandamus would lie to prevent an abuse of discretion.

to obtain it, and believing that counsel appointed by the court would have resources not available to him, Mr. Levin prepared and presented a petition for leave to withdraw his appearance (N.T. 216), which was allowed by the Court on April 15, 1948 (N.T. 220). Mr. Levin and Harry S. Berkowitz, Esquire, were then appointed by Judge Kun to represent the appellant (Ia, N.T. 222). The trial was continued to May 24, 1948, at which time it was listed for trial before Lewis, J., and again continued (N.T. 228) because counsel had been unable to secure the evidence from New York State and the authorities of the United State (N. T. 228). It was then listed for trial on June 22, 1948, before Mawhinney, J., again continued (N.T. 229) and next listed for trial on September 21, 1948 (N.T. 230) before Guerin, J.

On the day the case was listed for trial—about two weeks prior to September 21, 1948—at the request of the prosecuting attorney (N. T. 278), Judge Guerin conferred with him and petitioner's counsel in the Court's robing room (N.T. 278), for the first time, with respect to the trial of the indictment (N.T. 278), at which time, in the words of Judge Guerin, petitioner's counsel

> "presented a situation indicating we could not go on with the trial of the case

without the advantage of testimony from the hospital records in Brooklyn and in New York, that it was represented by counsel for the defendant [petitioner] that they had endeavored to obtain the voluntary appearance of the officials together with their records, and that had been refused; they said it would be necessary for them to resort to a petition under the Uniform Subpoena Act, with the allowance of the petition and the service of the petition, and then procure a proper order in the New York Court, which would require a matter of six or seven weeks"

(N.T. 278-279).

He, Judge Guerin, then agreed to permit

"the case to be called and not follow the usual custom, but continue its trial until its termination and that * * * [he] would permit the Commonwealth to introduce its evidence and * * * then set a day after allowance of the petition at which time the records could be brought from New York" (N. T. 279).

Petitioner's counsel then informed him that

"**they would enter a plea of guilty generally,** and request * * * [him] to obtain two fellow Judges to sit with * * * [him] and

hear the trial on the plea of guilty generally" (N.T. 279).

Pursuant to this arrangement, Judge Guerin called in Carroll and Sloane, J. J. (N.T. 279), to sit with him as a court en banc. **Petitioner's counsel made no request either at the pre-trial conference (N.T. 279), or at any other time (N.T. 280) for the appointment of a psychiatrist to assist them in the preparation and presentation of the cause (N.T. 280)**[10]; (see also, **Com. ex rel. Smith v. Ashe,** supra, at p. 99 of 364 Pa.).

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[10] Mr. Levin testified at the hearing, before Judge Welsh, on October 6, 1949, that a week or ten days prior to September 21, 1948, he, Mr. Berkowitz and Assistant District Attorney McClain, to whom the indictment had been assigned for prosecution, called upon Judge Guerin (N.T. 238), at which time counsel informed him of their inability to secure the evidence from the State of New York (N.T. 239), **their unsuccessful efforts to secure the appointment of a commission under the Mental Health Act of 1923 to inquire into relator's sanity** (N. T. 239), their appointment as counsel, under the Act of March 22, 1907, P. L. 31, 18 P. S. Section 784 (N.T. 239), **and requested the appointment of a psychiatrist to determine his sanity at that time** (N.T. 239). As a result of this conference, it was agreed by all that a plea of guilty generally would be entered (N.T. 240), the Commonwealth would produce its evidence, the petition under the Uniform Act to Secure Attendance of Witnesses from Within or Without the State in Criminal Proceedings, Act of June 23, 1941, P. L. 147, 19 P. S. Section 622.1, et seq., to secure the de-

After the matter was fully explained to the petitioner by his counsel, and his consent to the proposed course given (N.T. 243), on September 21, 1948, the former plea of not guilty was withdrawn and a plea of guilty generally entered (1a-2a, N.T. 242), the Commonwealth put in its evidence (10a-76a), a petition to secure the desired records from the mental institutions in the State of New York was presented and granted (4a-10a), and the case **continued** until October 27, and then to October 28, 1948 (77a), at which time the petitioner introduced the testimony of Dr. Fred Adams, a psychiatrist connected with the Kings County Hospital, Kings County, New York (77a), who had, in May or June of 1945 (78a), together with a psychiatrist and psychologist of that institution (82a) at the request of the County Court of Kings County, New York (83a), examined the petitioner (82a), diagnosed his mental condition as "psychosis, schizophrenia, hebephrenic type" (82a), a "men-

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sired evidence from the State of New York would be presented and allowed (N.T. 241), and the case continued to a day certain in October (N.T. 241). **Mr. Levin was under the impression, as a result of this conference, that if the evidence from the State of New York created an issue with respect to the relator's sanity, that the Court would permit the plea of guilty to be withdrawn and some method adopted to ascertain his mental condition (N.T. 241).**

tal disturbance characterized usually by illusions, hallucinations referable to the idea of persecution or grandeur" (82a), concluded that he was then "insane, not imbecile, and * * * [was] not capable of understanding the charge against him, the proceedings against him and of making his defense" (83a), and recommended that he "be committed to a hospital for the insane such as Brooklyn State Hospital, for the treatment of his mental condition" (83a).

As a result of this recommendation, on June 18, 1945, Honorable Nathan R. Sobel, County Judge of Kings County, New York, by an order entered in **People v. James Smith,** on an indictment at No. 441 of 1945, committed the appellant to the Brooklyn State Hospital **"until he shall no longer be in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, when he shall be returned to this court for disposition to the said indictment."** (118a-122a).

Dr. Clarence H. Bellinger, Senior Medical Director of the Brooklyn State Hospital, Brooklyn, New York (80a), testified that the petitioner was admitted to that institution on June 19, 1945, was examined by a psychiatrist and the diagnosis of the Kings County Hospital sub-

stantially confirmed (94a) except that the psychosis was concluded to be "catatonic" rather than "hebephrenic" (94a); that the petitioner improved while at that institution (94a), and, **as a result of an examination by the witness on October 9, 1945 (94a), was, pursuant to an order of the committing court entered on October 10, 1945,**" released to the New York City authorities on October 11, 1945 (94a) **"as having recovered from any mental illnesses which he had. He was clear and lucid"** (95a).

Records of the Brooklyn State Hospital (110a-140a) and a letter from Albert K. Kaplan, Md., Assistant Chief of the Neuro-psychiatric Department of the Philadelphia General Hospital,

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[11] "[9] The order reads as follows: ' . . . Now, on reading and filing the certificate of Dr. Clarence H. Bellinger, Director of the Brooklyn State Hospital, dated October 9th, 1945, that the said **James Smith has recovered from his mental illness so that at the present time he understands the nature of the charges against him and is able to confer with counsel in the preparation of his defense, it is ordered,** that the Director of the Brooklyn State Hospital be, and he hereby is, authorized and directed to deliver the said James Smith to the Department of Corrections of the City of New York, who shall convey said defendant and confine him in the City Prison, Brooklyn, **until he is recalled for judgment on the conviction herein.**' " (See **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 93, 105, f.n. 9).

to Mr. Levin, under date of April 28, 1948 (140a-143a), stating that the petitioner was admitted to that institution on December 27, 1945, upon his own application, at which time he was in an **acutely hallucinatory state following excessive indulgence in alcohol** and was discharged on January 4, 1946, when his condition upon admission, was diagnosed as "Acute Alcoholic Hallucinosis (142a)", as well as a letter from Dr. Henry F. Page, Medical Director of the Philadelphia County Prison, to Assistant District Attorney McClain, dated **March 8, 1948,** a carbon copy of which was sent to Dr. Baldi, the Superintendent, stating, inter alia: **"No evidence of acute psychosis at this time"** (143a-144a) were received into evidence.

At this stage of the proceeding, petitioner's counsel suggested to the court that, in view of the evidence adduced, the appellant was **"entitled to have some psychiatrist examine him"** (107a), **in which the court acquiesced** (108a). The proceeding was adjourned to November 5, 1948.

Dr. William Drayton, Jr., Chief of the Neuropsychiatric Department of the Philadelphia General Hospital (147a), was requested by the trial court to examine the petitioner, which he did (145a), having read the prior testimony

(146a) including the records from the Brooklyn State Hospital, which had been placed in evidence in the prior proceedings (155a).

Dr. Drayton testified at the adjourned hearing in answer to **Judge Guerin's direct question "Q. What is your diagnosis? A. He is of average intelligence, no psychosis, psychotically and neurologically negative"** (147a), **and that, in his opinion, was not only sane at the time of the commission of the crime charged in the indictment, but was then, on November 5, 1948, sane** (164a).[12] Petitioner's counsel were not only

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[12] "At the request of Judge Guerin the defendant had been examined a few days before November 5, 1948, by Dr. William Drayton, Jr., and his testimony is as follows: 'The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines . . .' When Dr. Drayton was asked: 'What is your diagnosis?', he answered: 'He is of average intelligence, no psychosis; psychotically and neurologically negative.' Dr. Drayton said that as far as he could tell the defendant had completely recovered from any mental illness of which there had been any prior history. He was asked: 'At the time you examined him did he appreciate the difference between right and wrong'? His reply was: 'He answered my question, "What happens to a person who kills," life for life.

permitted to extensively cross examine Dr. Drayton (147a-164a), but also allowed to place into the record the petitioner's hospitalization record in the Armed Forces of the United States (166a-168a), as well as lay testimony relevant to his history from birth up to the date of the crime (168a-208a).

On February 4, 1949,[13] the petitioner was adjudged guilty by the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, of mur-

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He said wrong to kill and he said he didn't kill anybody.' When asked: 'Would you say this man when he says he hears voices is a faker?' he replied: 'I think he is a faker.' When asked: 'You are not quite entirely convinced that this man is sane?', he replied: 'I believe that he is sane.' Judge Carroll asked Dr. Drayton the following question: 'In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?' He replied: 'I believe he was.' '' **Commonwealth v. Smith**, 362 Pa. 222, 226-227, 66 A. 2d 764.

[13] The docket entry on page 2a of the printed record in the Supreme Court of Pennsylvania in the case of **Commonwealth v. James Smith**, No. 137 January Term, 1949, erroneously states that the petitioner was adjudged guilty of murder in the first degree on September 21, 1949. This error was perpetuated in the appellant's [petitioner] paper book and is undoubtedly the reason for the statement of Mr. Chief Justice Maxey in Commonwealth v. Smith, at page 223 of 362 Pa. in conformity therewith.

der in the first degree and sentenced to death.[14] The judgment and sentence were affirmed by the Supreme Court of Pennsylvania on June 24, 1949, **Commonwealth v. Smith,** 362 Pa. 222, 66 A. 2d 764.

An application for executive clemency was made to the Pennsylvania Board of Pardons, **and after an investigation of his sanity** (N.T. 322), refused on September 21, 1949.

The collateral proceedings detailed in the statement were then immediately started.

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[14] 227a, 20a Appx. to Respondents' Brief.

SUMMARY OF ARGUMENT

1. "In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack, too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds." Holmes, J., in **Ashe v. Valotta,** 270 U. S. 424, 426.[15]

> "The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of the State in which the constitutional rights of a prisoner could have been claimed and maybe were rightly decided, or if not rightly decided, could be reviewed and redressed by a writ of error from this court."
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> **Markuson v. Boucher,** 175 U. S. 184, 187.

[15] Reversing the judgment of the District Court granting a writ of habeas corpus to a prisoner under sentence of death which had been affirmed by the Supreme Court of Pennsylvania, 279 Pa. 84, 123 A. 681.

See also **Darr v. Burford**, 339 U. S. 200, 207.

"But it must be remembered that habeas corpus is a collateral attack by the courts of Federal jurisdiction invading the province of State jurisdiction, * * *. **We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the States. We are not super-legislatures or glorified parole boards. We as courts look only to the violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the state.** That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. **For after all, the States**

represent the people more intimately than the Federal Government.

"To redress an alleged imbalance between the State's exercise of its power and the rights of the individual, the Federal courts exercise a delicate function, the importance of which points up our duty to consider the imbalance in the light of the rights of organized society through the State Government, representing all the people, as against the relator-defendant. There is no room here for crusades or the fulfillment of missions. We are to hold the balance true."

Minton, J., **Feeley v. Ragen**, 7 Cir., 166 F. 2d 977, 981

2. In passing upon an application for a writ of habeas corpus, the District Court has not only a **right**, but also a **duty** to consider records of trial proceedings, not only in its own court, but also other courts.

Dorsey v. Gill, D. C. Cir., 148 F. 2d 857, 870, cert. den. 325 U. S. 890;

See also **Darr v. Burford**, 339 U. S. 200, 215.

3. All of the issues raised in the application to the District Court were apparent on the face of the record of the trial court and were open to

review on the direct appeal to the Supreme Court of Pennsylvania.[16]

It is not the function of habeas corpus to serve as a substitute for an appeal.[17] The judgment is **res judicata** not only as to the questions raised,[18] but also those which could have been raised.[19].

Although Pennsylvania was not required, under the Fourteenth Amendment to do so (**Woolsey v. Best**, 299 U. S. 1), the Supreme Court of Pennsylvania did, upon the application for a

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[16] The petitioner, in his petition for writ of certiorari at No. 818 October Term, 1949 (transferred to No. 70 October Term, 1950), relied almost entirely on the record before the Supreme Court of Pennsylvania on the direct appeal at No. 137 January Term, 1949.

[17] **Sunal v. Large**, 332 U. S. 174; **Woolsey v. Best**, 299 U. S. 1; **Andrews v. Swartz**, 156 U. S. 212 (capital); **Felts v. Murphy**, 201 U. S. 123 (1906) (capital); **Valentina v. Mercer**, 201 U. S. 131 (capital); **Ex Parte Spencer**, 228 U. S. 652; **Jackson v. Brady** (4 Cir.) 133 F. 2d 476, cert. den. 319 U. S. 746 (capital); **Sanderlin v. Smith**, (4 Cir.) 138 F. 2d 729; see also, the dissenting opinion of Mr. Justice Reed in **Wade v. Mayo**, 334 U. S. 672, 694-695.

[18] **Frank v. Mangum**, 237 U. S. 309, 336; **Ashe v. Valotta**, 276 U. S. 424.

[19] **Morton v. Henderson**, 5 Cir., 123 F. 2d 48, 49; **Jackson v. Brady**, 4 Cir., 133 F. 2d 476, cert. den. 319 U. S. 746.

writ of habeas corpus, re-examine and determine all of the issues—both factual and legal—raised in the application to the District Court in this proceeding.[20] That determination in the absence of reversal by this court, was controlling in subsequent habeas corpus proceedings in the United States Court.[21]

5. Where there has been a square determination on the merits by the highest State Court with denial of certiorari by this Court, in the absence of extraordinary circumstances[22] (**Moore v. Dempsey,** 261 U. S. 86) the issues should not

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[20] 96 F. Supp. 104; 192 F. 2d 544.

[21] **Frank v. Mangum,** 237 U. S. 309 (capital case); **Ashe v. Valotta,** 270 U. S. 424 (capital case); **Salinger v. Loisel,** 265 U. S. 224; **Wong Doo v. United States,** 265 U. S. 239; **Pope v. Huff,** D.C. Cir., 141 F. 2d 727; **Karpathiou v. Jordan,** 7 Cir., 153 F. 2d 811; **Swihart v. Johnston,** 9 Cir., 150 F. 2d 721; **Dorsey v. Gill,** D.C. Cir., 148 F. 2d 857, cert. den. 325 U. S. 890; Cf., **Wells v. United States,** 5 Cir., 158 F. 2d 833; **Sander v. Johnston,** 9 Cir., 11 F. 2d 509; **Pagett v. McCauley,** 9 Cir., 95 F. 2d 839; **Rolfe v. Lloyd,** 9 Cir., 102 F. 2d 606; **Bergdoll v. Drum,** 2 Cir., 107 F. 2d 897.

[22] The death sentence has not been regarded as constituting an extraordinary circumstance: **Weber v. Ragen,** 7 Cir., 176 F. 2d 579, cert. den. 338, U. S. 809; **Ex Parte Adamson,** 9 Cir., 167 F. 2d 996 cert. den. 334 U. S. 834; **Bird v. Smith,** 9 Cir., 175 F. 2d 260; **Brown v. Allen,** 4 Cir., 192 F. 2d 477; **Speller v. Allen,** 4 Cir., 192 F. 2d 477; **Daniels v. Allen,** 4 Cir., 192 F. 2d 763.

be inquired into upon habeas corpus in the United States Courts.[23]

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[23] **House v. Mayo**, 324 U. S. 42, 48; **White v. Ragen**, 324 U. S. 760, 764-765; **Parker, Limiting the Abuse of Habeas Corpus**, 8 F.R.D. 171, 173-174, 178.

Second Circuit: Monsky v. Warden of Clinton State Prison, 163 F. 2d 978, cert. den. 332 U. S. 848; **Morrison v. Foster**, 175 F. 2d 495, 497; **Steele v. Jackson**, 171 F. 2d 432, cert. den. 336 U. S. 939; **Schechtman v. Foster**, 172 F. 2d 339, cert. den. 339 U. S. 924.

Fourth Circuit: Brown v. Allen, 192 F. 2d 477; **Goodman v. Swenson**, 173 F. 2d 349; **Adkins v. Smyth**, 188 F. 2d 452; **Bernard v. Brady**, 164 F. 2d 881, cert. den. 332 U. S. 856; **Haughey v. Smyth**, 170 F. 2d 68; **Goodwin v. Smyth**, 181 F. 2d 498; **Edmondson v. Wright**, 177 F. 2d 719, cert. den. 338 U. S. 944; **Holiday v. State of Maryland**, 177 F. 2d 844; **Speller v. Allen**, 192 F. 2d 477; **Daniels v. Allen**, 192 F. 2d 763.

Fifth Circuit: Bailey v. Stoutamire, 155 F. 2d 754.

Seventh Circuit: Parker v. Carey, 135 F. 2d 205, 320 U. S. 755; **Weber v. Ragen**, 176 F. 2d 579, cert. den. 338 U. S. 809; **Holderfield v. Ragen**, 170 F. 2d 189, cert. den. 336 U. S. 906.

Eighth Circuit: Mart v. Lainson, 169 F. 2d 1016.

Ninth Circuit: Bird v. Smith, 175 F. 2d 260; **Moore v. Smith**, 164 F. 2d 483.

ARGUMENT

The Issues Raised in the Application Were All Open to Review on the Direct Appeal

(a) Scope of review by the Supreme Court of Pennsylvania

"In all cases of **felonious homicide**, and in such other criminal cases as may be provided by law, the accused, after conviction and sentence, may remove the indictment, record, and all proceedings to the Supreme Court for review."[24] (Emphasis supplied).

That Court has, under Section 13 of the Act of May 22, 1722, 1 Sm. L. 131,[25] 17 Purdon's Penna. Statutes Annotated Section 41 (Historical Note)

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[24] Article 5, Section 24, Constitution of Pennsylvania; See also, Section 1, Act of February 15, 1870, P. L. 15, 19 Purdon's Penna. Stat. Annotated, Sec. 1186.

[25] "And that the said Judges [of the Supreme Court] or any two of them, shall have full power to hold the said court, and therein to hear and determine all causes, matters and things, cognizable in the said court, * * * and to examine and correct all and all manner of errors of the Justices and Magis-

and Section 1 of the Act of June 16, 1836, P. L. 784[26] Purdon's Penna. Statutes Annotated Section 41, the power "to minister justice to all persons."[27] When the occasion demands, the Supreme Court of Pennsylvania will exercise its

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trates of this province, in their judgments, process and proceedings in the said courts, as well in all pleas of the crown * * * and thereupon to reverse or affirm the said judgments, as the law doth or shall direct * * *."

[26] "The supreme court of this commonwealth shall have power to hear and determine all, and all manner of pleas, plaints, and causes which shall be brought, or removed there from any other court of this commonwealth, by virtue of any writ or process issued by the said court, or any judge thereof, for that purpose, in the manner now practiced and allowed, **to examine and correct all and all manner of errors of the** justices, magistrates, and **courts of this commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify, or affirm such judgments and decrees, or proceedings, as the law doth or shall direct; and generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the Justices of the Court of King's Bench, Common Pleas, and Exchequer, at Westminster, or any of them, may or can do.**" (Emphasis supplied)

[27] **Commonwealth v. Ragone**, 317 Pa. 113, 127, 176 Atl. 454.

full powers "to minister justice" and protect personal rights "by speedy and summary interposition."[28]

(b) The issues presented by the application were whether the applicant had been denied due process of law by:

(1) The failure of the trial court to appoint counsel in advance of arraignment, where the plea, on arraignment, was "not guilty" and the trial did not occur for sev-

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[28] "As the only question now before us is: 'Does a writ of coram nobis lie?' we could end this opinion by a negative answer to that question. **But since no appeal to this court was taken from the judgment of conviction of murder, and since counsel who now represents the defendant maintains that a great injustice was done the latter; and since this court if convinced in any case brought before it that a grievous wrong has been done therein will promptly take appropriate measures to undo it, we have carefully reviewed the record to ascertain whether or not the defendant was legally convicted of the crime charged. Our conclusion is that he was and that the evidence completely supports the verdict.**" (**Commonwealth v. Harris**, 351 Pa. 325, 333, 41 A. 2d 688) (Emphasis supplied). See also, **Commonwealth v. Ragone**, 317 Pa. 113, 127-128, 176 Atl. 454; **Commonwealth v. Jones**, 303 Pa. 551, 154 Atl. 480; **Commonwealth v. Loomis**, 267 Pa. 438, 447-448, 110 Atl. 257; Cf., **Commonwealth v. Senauskas**, 326 Pa. 69, 191 Atl. 167.

eral months following the appointment of counsel;

(2) By the failure of the court to direct a withdrawal of the plea of "guilty" and submit the question of petitioner's sanity to a special jury;

(3) By the refusal of the trial court to appoint a psychiatrist to assist the petitioner in the preparation and presentation of his defense; and

(4) By adjudicating the petitioner guilty of murder in the first degree after hearing only the testimony of the prosecution and refusing to hear any evidence thereafter except on the issue of penalty.

These will be discussed seriatim.

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(1)

If the petitioner's counsel had felt that the petitioner had been prejudiced by the entry of his plea of "not guilty" on the arraignment, he could have moved for the withdrawal of it, thereby specifically keeping the record open for review.[29] The docket entries, however (1a), clear-

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[29] Cf., **Taylor v. Commonwealth**, 109 Pa. 262.

ly disclose that counsel had not been appointed until after the arraignment. If the prejudice which the petitioner now asserts actually did occur (the respondents assert that it did not), it was counsels' duty to present that matter to the Supreme Court of Pennsylvania on the direct appeal. **The entry of the plea did not deprive the petitioner of due process of law.**[30] Actually, however, the petitioner suffered no prejudice. Even had counsel been exhaustively familiar with the 1945 commitment proceedings in Kings County, New York, on an indictment at No. 445 of 1945, Kings County, sub nom **People v. James Smith**, it is difficult to understand how that knowledge would have been of any benefit to the petitioner although it had been presented to the court on arraignment. **The action of the New York Kings County Court approv-**

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[30] **Canizio v. New York**, 327 U. S. 82; **Ruben v. Welch**, 4 Cir., 159 F. 2d 493, cert. den. 331 U. S. 814; **Setser v. Welch**, 4 Cir., 159 F. 2d 703, cert. den. 331 U. S. 840; **Holloway v. Welch**, 4 Cir., 160 F. 2d 575; **Wilfong v. Johnston**, 9 Cir., 156 F. 2d 507; **McJordan v. Huff**, D.C. Cir., 133 F. 2d 408; **Council v. Clemmer**, D. C. Cir., 177 F. 2d 22, cert. den. 338 U. S. 880; **In Re Reed**, D. C. Cir., 158 F. 2d 323; **Dorsey v. Gill**, D. C. Cir., 148 F. 2d 857, cert. den. 325 U. S. 890; **Alexander v. United States**, D.C. Cir., 136 F. 2d 783; Cf., **Gann v. Pescor**, 8 Cir., 164 F. 2d 113; **Hiatt v. Gann**, 5 Cir., 170 F. 2d 473; **Williams v. Swope**, 9 Cir., 186 F. 2d 897.

ing the findings of the Brooklyn State Hospital that the petitioner had recovered from his temporary disability sufficiently to permit proceedings on the indictment, (see footnote 11) was an adjudication of restoration, in conformity with the requirements of due process[31]. Presumptively, therefore, the petitioner was mentally competent when called upon to plead to the indictment[32]. The validity of the presumption is persuasively confirmed by the opinion of Dr. Page, the medical director of the Philadelphia County Prison, expressed in a letter to the Assistant District Attorney, dated March 8, 1948, the refusal of Dr. Baldi, the Superintendent of that institution, to initiate an inquiry under the Mental Health Act of 1923, supra, the testimony of Dr. Drayton at the trial,[33] the examination by the Pennsylvania Board of Pardons,[34] the testimony of Dr. Baldi in the proceedings before the District Court at M-1334[35] as well as certain

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[31] Cf. **Nobles v. Georgia**, 168 U. S. 398; **Solesbee v. Balkcom**, 339 U. S. 9.

[32] See concurring opinion of District Judge Bard, **United States ex rel. Smith v. Warden of Philadelphia County Prison** at p. 342 of 87 F. Supp.; **Commonwealth ex rel. Smith v. Ashe et al.**, at pp. 107-109 of 364 Pa.

[33] See 145a-177a.

[34] See N.T. 322, 342.

[35] See N.T. 342-347.

documentary exhibits introduced therein[36] which may be appropriately considered.[37] **In the aggregate, it all adds up to a conclusion that any preliminary inquest either prior to arraignment or after arraignment would have merely confirmed the presumption of mental competency which was necessarily admitted by the plea of guilty. Furthermore, the petitioner was not, as his counsel appear to assume, entitled to a preliminary inquiry, as a matter of right,**[38] or, to state it differently, whether or not an inquiry should be undertaken lay within the sound discretion of the court. When a doubt concerning petitioner's mental condition arose, the court appointed an impartial psychiatrist, to examine the appellant and report to the court. It was the opinion of this expert that the petitioner was, at the time of the crime, arraignment and trial,

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[36] See N.T. 324-334, 356.

[37] See **United States v. Chandler**, 72 F. Supp. 230, 238, affirmed 171 F. 2d 921, cert. den., 336 U. S. 918, 69 S. Ct. 640.

[38] "The second basic error of relator's counsel is that if there had been a prior finding of insanity of the prisoner called for trial it is necessary that the question of the prisoner's sanity at the time of the trial be submitted to the jury trying the case or at least that there be some formal adjudication of his sanity. This is not the law." **Commonwealth ex rel. Smith v. Ashe et al.**, supra at pp. 109-110 of 364 Pa. and cases cited in footnotes 43, 44 and 45 post.

mentally competent[39]. Although this occurred after the withdrawal of the plea of not guilty and the entry of the plea of guilty, the petitioner suffered no actual prejudice, for had there been any doubt in the court's mind after the reception of the testimony of the impartial expert concerning his mental competency it would have directed a withdrawal of the plea of guilty[40], declared a mistrial and proceeded on the issue of insanity. The petitioner asserts that the court didn't have the power to do so, but the Supreme Court of Pennsylvania apparently thinks otherwise, f.n. 11, 364 Pa. 107.

Did the trial court determine the petitioner's mental condition in accordance with the generally recognized norms of procedural due process? The answer is **yes.**

It is the rule in Pennsylvania, as in all common law jurisdictions, that a person charged with a crime, although he may have been sane when the crime was committed, may not be called upon to plead or be placed on trial, if, in the interim, he has become insane[41]. At the com-

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[39] See footnotes 54 and 55 infra.

[40] See footnote 11, pp. 106-107 of 364 Pa. and also N.T. 284, 289, 295, 296, 300.

[41] **Commonwealth v. Endrukat,** 231 Pa. 529, 533-534, 80 Atl. 1049; **Commonwealth v. Scovern,** 292 Pa. 26, 29, 140 Atl. 611; **Commonwealth v.**

mon law, if there were any doubt in the court's mind concerning the prisoner's sanity when called upon to plead, arising from personal observations, information received from others, motions or suggestions by the prosecution or defense counsel, the issue was frequently submitted to a special jury to satisfy the court's conscience[42]. Whether or not a preliminary inquiry would be made lay within the sound discretion of the court.[43] If the court were of opin-

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Ragone, 317 Pa. 113, 124-126; 176 Atl. 454; **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 109.

[42] **Webber v. Commonwealth**, 119 Pa. 223, 236-237, 13 Atl. 427; **Youtsey v. United States**, 6 Cir., 97 Fed. 937, 943.

[43] **Youtsey v. United States**, id.; **State v. Harrison**, 36 W. Va. 729, 15 S.E. 982; **State v. Arnold**, 12 Iowa 479; **Jones v. State**, 13 Ala. 153; **United States v. Chisolm**, 149 Fed. 284; **State v. Khoury**, 149 N.C. 454, 62 S.E. 638; **State v. Stone**, 111 Ore. 227, 226 Pac. 430; **State v. Kelley**, 74 Vt. 278, 52 Atl. 434; **State v. Peterson**, 90 Wash. 479, 156 Pac. 542; **State v. Fabisinski**, 111 Fla. 454, 152 So. 267; Cf. **People v. Esposito**, 287 N.Y. 389, 39 N.E. 2d 925; **Whitfield v. State**, 236 Ala. 312, 182 So. 42; **Wilhite v. State**, 158 Ark. 290, 250 S.W. 31; **People v. Loomis**, 170 Cal. 347, 149 Pac. 581; **People v. Rice**, 83 Cal. App. 55, 256 Pac. 450; **Boyd v. People**, 108 Colo. 289, 116 P. 2d 193; **People v. Maynard**, 347 Ill. 422, 179 N.E. 833; **Davidson v. Commonwealth**, 171 Ky. 488, 188 S.W. 631; **Murrell v. Commonwealth**, 291 Ky. 65, 163 S.W. 2d 1; **State v. Messer**, 194 La. 238, 193 So. 633; **State v. Schlaps**, 78 Mont. 560, 254 Pac. 858; **Johnson v. State**, 73 Okl.

ion that a preliminary inquiry should be undertaken, the method of procedure lay largely within its discretion[44]. The defendant was not entitled, however, to a separate jury trial[45], but the court might proceed to determine the matter itself[46], or submit it to the jury trying the indictment[47].

Pennsylvania follows the common law practice with respect to the determination of insanity at arraignment or trial. Section 67 of the Crim-

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Crim. Rep. 370, 121 P. 2d 625; **State v. Nelson**, 162 Ore. 430, 92 P. 2d 182; **State v. Davis**, 6 Wash. 2d 696, 108 P. 2d 641.

[44] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **United States v. Chisolm**, 149 F. 284; **United States v. Fore**, 38 F. Supp. 140; **State v. Peacock**, 50 N. J. L. 34, 11 Atl. 270; **Johnson v. State**, 57 Fla. 18, 49 So. 40; **State v. Harrison**, 36 W. Va. 729, 15 S.E. 982; **State v. Khoury**, 149 N.C. 454, 62 S.E. 638.

[45] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937.

[46] **State v. Peacock**, 50 N.J.L. 34, 11 Atl. 270; **Whitney v. Zerbst**, 10 Cir., 62 F. 2d 970; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **United States v. Fore**, 38 F. Supp. 140; **State v. Hagerty**, 152 Minn. 502, 189 N.W. 411.

[47] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **People v. Farrell**, 31 Cal. 576; **United States v. Fore**, 38 F. Supp. 140.

inal Procedure Act, Act of March 31, 1860, P. L. 427, 19 Purdon's Penna. Stat. Annotated, Section 1352, authorizes the court, when it appears on arraignment that the defendant is not sane—the burden is on the prisoner to call facts to the attention of the court which would shed doubt on indulgence in the presumption of sanity[48] —to impanel a special jury to try the issue[49]. The court, however, is not obliged to follow this course, but may submit the issue to the jury trying the indictment[50], or appoint a commission[51]. It is a matter of discretion—not one of right[52].

Thus, the practice in Pennsylvania is substantially identical with the practice in other non-

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[48] **Commonwealth ex rel. Mulligan v. Smith**, 156 Pa. Superior Ct. 469, 40 A. 2d 701.

[49] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Endrukat**, 231 Pa. 529, 80 Atl. 1049; **Commonwealth v. Ragone**, 317 Pa. 113, 176 Atl. 454.

[50] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Endrukat**, 231 Pa. 529, 80 Atl. 1049.

[51] **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823.

[52] "* * * A defendant charged with a crime who invokes a statutory or common law remedy to determine his sanity before trial or after conviction has no constitutional right to be confronted by or cross examine witnesses or the members of the commission appointed to ascertain that fact. Such inquiries are for the determination of a fact apart, separate and

statutory common law jurisdictions in the United States, including the federal jurisdictions.

The practice which has prevailed for centuries in the common law jurisdictions and, hence, is firmly entrenched in the common law juridical concept of due process of law, has, it appears, satisfied the demands of justice. Indeed, the Supreme Court of the United States has impliedly, at least, held that this practice satisfies due process of law. Cf. **Nobles v. Georgia,** 168 U.S. 398, 408-409; **Solesbee v. Balkcom,** 339 U.S. 9.

Nor, is there anything in **Phyle v. Duffy,** 334 U.S. 431, which would, as the petitioner suggests, require or justify the conclusion that the practice in Pennsylvania violates procedural due process. Indeed, as respondents analyze the opinions of this Court in **Phyle v. Duffy,** supra, and **Solesbee v. Balkcom,** supra, it is felt

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distinct from that of guilt of the crime itself, as to which trial or sentence may or may not be ordered. **The appointment is not demandable of right and if it is contended the members appointed are biased or otherwise incompetent, objection, with the reason therefor, should be made to the court at the time of appointment. The court may then determine whether it has made a mistake in the selection of persons to inform its conscience.** * * *" id at p. 69 of 319 Pa. See also cases cited, footnotes 43, 44, 45, supra. (Emphasis supplied).

that **Nobles v. Georgia**, supra, which was cited approvingly by Mr. Justice Kephart in **Commonwealth v. Iacobino**, supra, at p. 72 of 319 Pa., which impliedly approves the practice in Pennsylvania, as well as in other common law jurisdictions of reposing the determination of an accused's mental condition to plead, stand trial, etc., to the discretion of the trial judge, functioning as a court, was unequivocally reaffirmed.

The trial court, as is clearly manifested by the record in the trial proceedings (90a, 91a, 95a, 108a, 165a, 168a, 177a, 182a, 209a), as well as their testimony in the proceedings before the court below at M-1334 (N.T. 269, 273-274, 284, 294-295, 300, 301-303) recognized and discharged their duty to the petitioner in conformity with the requirements of due process. As soon as the evidence created the slightest doubt in the court's mind concerning the petitioner's mental condition to stand trial, it requested Dr. William Drayton, Jr., an expert, to acquaint himself with the past mental history of the petitioner as it appeared in the record of the trial proceedings, examine the petitioner, and report his findings to the court[53]. Dr. Drayton performed this assign-

[53] The court had a right to proceed in this fashion. See: **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823; **People v. Linton**, 102 Cal. App. 608, 283 Pac. 389; **Hunt v. State** 248 Ala. 217, 27 So. 2d 186;

ment after having read the prior evidence, including the documentary evidence from the Brooklyn State Hospital, Brooklyn, New York. His report was given in open court—it will be noted that he was called by the court as its witness—(145a) and first examined by Judge Guerin (145a-177a)[54], and later by Judge Carroll

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Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2484; **Wigmore on Evidence**, 3rd Ed., Vol. II, Sec. 563; **Beuscher, The Use of Experts by the Courts**, 54 Harvard Law Review, 1105 (1941); **Young v. United States**, 5 Cir., 107 F. 2d 490; **Rule 28**, Fed. Rules of Criminal Procedure, 18 U.S.C.A. Rule 28 (App'x).

[54] "By Judge Guerin:

"Q. Did you examine one James Smith at my request?

"A. Yes, I did. I saw him day before yesterday and yesterday.

"Q. Will you give us the result?

"A. The reason for the second examination was because I did not have the notes of testimony and I did not know just what had happened before, what he had done, except the end result, but I mean what led up to it.

"Q. Did you before the time of the second examination have the advantage of reading the testimony?

"A. Yes.

"Q. Will you state the result?

"A. * * * Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines. * * * He has no psychosis.

(164a)[55]. Petitioner's counsel were accorded the privilege[56] of cross examining the court appointed psychiatrist (147a-166a) and introducing lay testimony. Any doubts which the court might have entertained with respect to the petitioner's mental condition were dispelled by Dr. Drayton's testimony, the accuracy of which

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"Q. What is your diagnosis?

"A. He is of average intelligence, no psychosis; psychotically and neurologically negative." (Emphasis supplied).

[55] "By Judge Carroll:

"Q. In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?

"A. I believe he was.

"Q. Was he capable of understanding what he was doing on his own part?

"A. I believe so.

"Q. As of this date is this man capable of distinguishing between right and wrong in your opinion?

"A. I believe he is.

"Q. I would like to ask your reaction. Look at that man now. Notice the motions of his lips. Notice his expression. Doctor, if that man at the present time is compos mentis, is his conduct as we look at him the act of an exhibitionist or an act of the insane?

"A. I believe it is an exhibition."

[56] **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823, at pp. 72-73 of 319 Pa.

has been subsequently confirmed by documents prepared by the relator (N.T. 324-334) and admitted into evidence (N.T. 356),[37] the psychiatric examination at the instance of the Pennsylvania Board of Pardons (N. T. 322, 342), and the testimony of Dr. Baldi, the Superintendent of the Philadelphia County Prison (N.T. 342-347).

(2)

It was evident, on the face of the record (106a, 107a, 210a), that the petitioner had not had the assistance of a psychiatrist in the preparation and presentation of his cause. The question was open to review on the appeal. Indeed, it was argued[38], in a left-handed way, probably because

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[37] See **United States v. Chandler**, 72 F. Supp. 230, 238, affirmed 171 F. 2d 921, cert. den., 336 U. S. 918.

[38] "When all of this is added to appellant's conduct at the trial, it seems apparent to us that counsel was in no position to properly cross examine Dr. Drayton or prepare or present the defense, either in establishing insanity as a complete defense or in mitigation of the penalty. We were denied the opinions and guidance of psychiatrists and were compelled to cross-examine Dr. Drayton upon a subject with which we had but a passing knowledge, gleaned from a textbook written for psychiatrists, not lawyers." (pp. 18, 19, Appellant's Brief in the Supreme Court of Pennsylvania at No. 137 January Term, 1949).

the law of Pennsylvania was to the contrary.[59]

(3)

This issue was unquestionably open for review on appeal. Had the matter been called to the attention of the Supreme Court of Pennsylvania it would have either squarely resolved the conflict between the docket entries, as certified to it, and the intention of members of the court en banc as evidenced by the record, and, if convinced that an actual adjudication of the degree had been made before the reception of the petioner's evidence, would have undoubtedly reversed. **Commonwealth v. Johnson**, 348 Pa. 349 355, 35 A. 2d 312.

Neither the docket entries submitted to the Supreme Court of Pennsylvania (1a-3a) nor the initial entries on the bill of indictment[60], reflect the true situation, viz., that the matter was open as to all phases—degree of the crime as well as

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[59] The issue was squarely presented, and rejected by, the Supreme Court of Pennsylvania in **Commonwealth v. Green**, 346 Pa. 172, 29 A. 2d 491; **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 93, 110, 71 A. 2d 101, cert. den. 340 U. S. 812.

[60] Judges Guerin, Sloane and Carroll state that while the insertions of the date "2-4-49" which appear on the bill of indictment over their signatures reflect what actually occurred, they have no recollection of that material being on there when they signed it.

the appropriate penalty—until all of the evidence was in.

The petitioner's position on this point, and **this conclusively demonstrates the validity of the respondent's contention that it was open to review on appeal,** is based **entirely** on the indictment and Judge Guerin's statement at (76a)[61] made after a colloquy between the court and counsel (75a) during which counsel apparently conceded (75a-76a)[62] that the Commonwealth

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[61] "Judge Guerin: Gentlemen, we have taken the matter under consideration. We feel that there is but one announcement to be made at this time. The order requested in the petition will be made and the return day fixed for Wednesday, October 27th. In the meantime it will be understood that a written statement of the defendant's position will be embodied in the record stating that the purpose of the medical testimony sought to be secured from New York is simply in mitigation of the penalty, and also any other testimony that may be offered by the defendant, and have the statement signed by the defendant and by counsel."

[62] "Mr. Berkowitz: The defendant, prior to the entry of the plea in this case, that is counsel for the defendant understood that with the consent of the Court the defendant would not put in his evidence at this time. There are numerous witnesses in New York City and in Brooklyn, especially hospitals where this defendant was confined, and we have prepared a petition under the Reciprocal Subpoena

had established murder in the first degree[63], as, indeed, it had by the petitioner's voluntary con-

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Act to subpoena the records from New York as well as these various doctors who had charge of this man, and it was our understanding that the District Attorney and the Court approved that we present the petition this morning and fix a date for the defendant's evidence so that we can subpoena the witnesses from New York, the practice being that we get a certificate from this Court and then we must take it to the Supreme Court of New York, by a Judge of that Court, who sends for these people, and that takes two or three weeks, and we therefore ask for a month.

"(Discussion between Court and counsel on the purpose of the petition.)

"Judge Carroll: What I am trying to find out is are you going to offer this evidence in mitigation of punishment or as affecting the degree or grade of crime?

"Mr. Levin: All I can tell you at this time that in my opinion we will be offering it for mitigation purposes.

"(The Court recessed for a conference.)"

[63] "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnaping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. * * *" Sec. 701, The Penal Code, Act of June 24, 1939, P. L. 872, 18 Purdon's Penna. Stat. Annotated, Sec. 4701.

fession (60a-65a)[64], which has not, in any way,

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[64] "By Detective Michael Schwartz, No. 95:

"Q. What is your name, age, and address?

"A. James Corbett Smith. I'm twenty-two. I live at 112 Bainbridge Street.

"Q. Now, James Smith, we want you to make a statement in regard to the shooting of a taxicab driver this morning, January 15, 1948, about 12:20 or 12:30 a.m. You were placed under arrest at that time. I want you to know that whatever you say can be used against you at the time of your trial in court. And if you do make a statement, it will have to be of your own free will—in your own way; and the statement is not being made by you, due to any threats, abuse, or any promise of leniency. Do you understand that?

"A. Yes, sir.

"Q. You still want to make a statement of your own free will?

"A. Yes, sir.

"Q. Go on, James, and tell us just what happened?

"A. I went to Fifth and South. I got in the cab at the cab stand. I told him to take me to Pier 98. I went in the cafeteria, got a bottle of beer. Took a couple of swallows of the beer. The cabbie was waiting. Told him to wait. So I told him to take me to South and Delaware Avenue. He said it was too bumpy on Delaware Avenue and so he went out Front and Bainbridge. East on Bainbridge to Delaware.

"As he turned the corner I told him it was a holdup. I pointed the gun at him and he bent over as though he was reaching for something, so I shot him. The cab was still in motion. I jumped over to the front seat and tried to find the ignition. I

ever been challenged. Judge Guerin's statement

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couldn't find it so I put my foot on the brake. Stopped the car. At the time, a tow truck swung around.

"The tow truck driver was in the truck. He got out. At the time, he took a lug wrench in his hand and he got out of the other side of the tow truck and came around the front part of the tow truck. And he took a hold of me and hailed another cab that was coming down. And he told the other cab driver to hold me. But the other cab driver said, 'No, I won't hold him, I want to look at the man'—meaning the driver in the cab, that I shot. So he went to the cab and looked at the cab driver. And he came back again and said he was bleeding. By that time the red car came up.

"So the red car came up. The gun was on the seat of the cab. The cop picked up the gun on the seat. I was in the red car at the time. I saw the police officer pick the gun up off the front seat. The police officer used a handkerchief to pick up the barrel. So they put me in the Police Car. And after that the whole gang came down and they brought me to the station house.

"Q. Now, James, I'm showing you a blue steel, .32 caliber long, side ejector, Spanish make revolver, with wood check grips, three and-a-half inch barrel, with Serial No. on the bottom, 16738. Is this your revolver?

"A. I took it. Didn't belong to me.

"Q. Is this the revolver that you had at the time that you held up the cab driver, and the revolver [you] shot the cab driver with?

"A. Yes, sir.

"Q. How many bullets did this revolver have?

"A. Six.

at (76a) must be considered not only in its peculiar context but also with subsequent state-

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"Q. How many shots did you fire?

"A. One.

"Q. How long have you had this revolver?

"A. Since the first part of last week.

"Q. When you left home and took this revolver with you; why did you take this revolver with you?

"A. Because I needed some money, and I thought I'd hold somebody up.

"Q. When you told the cab driver that it was a hold up, did the cab driver say anything to you?

"A. No, sir. I had the gun pointed at him. He didn't say anything.

"Q. Did the cab driver pull any money out of his pocket and try to hand it to you?

"A. No, sir. I didn't even mention it to him. I was too nervous and scared-like.

"Q. After you shot the cab driver, what did you do with the gun?

"A. I dropped it.

"Q. Where?

"A. When I grabbed out to find the ignition I dropped it and it landed on the front seat right beside the cab driver on the left side of the cab driver, near the wheel. I dropped it when I reached for the wheel. He was laying over to one side.

"Q. Was the cab in motion?

"A. The cab was in motion.

"Q. When you first got into the cab, did you get in with the intention of sticking up the driver?

"A. At the time, I didn't.

"Q. When did this thought come into your mind, of holding the cab driver up?

"A. When I got down to Pier 98, when I bought the beer.

ments by Judge Carroll (90a)[65]; (165a)[66], and by Judge Guerin (91a)[67], (95a)[68],

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"Q. When you left your home, was this revolver loaded?

"A. It wasn't.

"Q. When did you load it?

"A. When I left the store—the restaurant—on 3rd St.

"Q. When you got into the taxicab at Fifth and South, was the revolver loaded?

"A. Yes, it was.

"Q. Why did you load the revolver?

"A. Because I was going to stick up anybody that come by, as I needed money."

[65] "Judge Carroll: Don't you see what he is doing; he is helping you to prepare your resistance of this when the trial of this case comes, which may not come, when this plea will have to be withdrawn and the defendant will have to be tried."

[66] "Judge Carroll: Don't you think that we observe defendants? Don't you know it is our duty to observe defendants, especially when we are confronted with such a situation as this?"

[67] "Judge Guerin: Mr. Levin, the course that the defendant's case has taken has led the entire Court to believe it would be in the interest of justice if counsel would make a statement of record what they propose to prove and by whom and upon that proposal or offer of proof **we will consider the matter further and announce a decision.** That will save the time of doctors and the Court and everybody else." (Emphasis supplied).

[68] "'Mr. Levin: Shall I proceed to examine him further in the face of that statement? Does that

(108a)[68] (210a)[69], as well as the opinion of the court en banc (211a-227a) which clearly evidences that the **final** adjudication was made **only** after a consideration of **all** evidence and that the

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satisfy any uncertainty which your Honors may have had in regard to the withdrawal of the plea?

" 'Judge Guerin: It does not to my idea.' "

[68] " 'Judge Guerin: This is all argument to be addressed to the court at the proper time. Counsel for the defendant have requested leave to have the defendant examined by a psychiatrist. We have conferred and concluded by reason of the seriousness of the charge, to grant that request. We understand that will conclude your case; so when the request has been complied with and report made there will be nothing to interfere with a full disposition of the case by the court. Is that correct?

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" 'Judge Guerin: Continued to Friday, November 5, 1948, in Room H, 446 City Hall, at 11:00 a.m. Before that time we will have obtained an examination by a psychiatrist to be appointed by the Court and the report will be available to counsel, the Commonwealth and the Court, and on the basis of the **entire record** a final disposition will be made by the Court under general plea of guilty.

"We have before us a report from the Department of Public Health addressed to Mr. Levin, dated April 28, 1948, and we will direct that to be made a part of the record." (Emphasis supplied).

[69] "On request of counsel the Court allows ten days for the filing of briefs in lieu of oral argument and the Court will then set a date for final disposition."

whole matter was open up to conclusion of the trial. This conclusion is corroborated by Judge Guerin's testimony on cross examination at the hearing before District Judge Welsh at M-1334 (N.T. 292-293[70], 296[71]).

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[70] "By Mr. McBride:

"Q. The question was, whether your Honor [Judge Guerin] didn't order that the only effect of the testimony that would be produced subsequent to the 21st would be in connection with the **penalty**, and I direct Your Honor's attention to page 76a.

"A. That is the effect of it, yes."

"Q. You mean that the Court, while the degree of the offense was still open on the record on a general plea of guilty, is it Your Honor's understanding that this Court was willing and did accept the stipulation that would restrict its evidence no matter what it was so that the Court could consider it only in mitigation of penalty?

"A. **Of course, that mitigation would relate to mitigation of penalty for manslaughter or second degree, too.**"

[71] "By Mr. McBride:

"Q. Suppose the evidence created a doubt and didn't satisfy Your Honor by a preponderance of the evidence that the man was insane, what would Your Honor conceive to be your duty under that circumstance?

"A. My individual judgment would be a mistrial should be declared.

"The Court: Now?

"The Witness: No, he asked a hypothetical question if the evidence had indicated what he said, what I would have done.

"The Court: Oh, very good.

All of the issues raised by the application to the District Court were open to review on the direct appeal. The reason they were not presented quite obviously is because there was no foundation to them either in fact or in law.

The Issues Presented in the Application to the District Court were Controlled by the decision of the Supreme Court of Pennsylvania

The Supreme Court of Pennsylvania adjudicated, after obvious careful consideration, in its opinion reported at 364 Pa. 93, 71 A. 2d 107, cer. den. 340 U. S. 812, **every one** of the issues presented in the application to the District Court. The respondent submits this brought it squarely within **Frank v. Mangum,** 237 U. S. 309, **Ashe v. Valotta,** 270 U. S. 424, **Salinger v. Loisel,** 265 U. S. 224, and **Wong Doo v. United States,** 265 U. S. 239. That adjudication was not defective, as the petitioner seems to think,

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"By Mr. McBride:

"Q. As I indicated in my previous question, Your Honor said that you were in doubt—

"A. That is right, at the moment. I might say, Mr. McBride, I think any Judge is in doubt or should be in doubt until the termination of **all the evidence in the case before** coming to a conclusion."

merely because the Supreme Court of Pennsylvania disposed of the issues raised by the application for a writ of habeas corpus on the basis of its record at No. 137 January Term, 1949[72]. Nor was it defective simply because it considered the testimony taken at the petitioner's insistence in the District Court at M-1334 which, by virtue of its incorporation into the respondent's answer and the Warden's return was before the Supreme Court of Pennsylvania. But, apart from that, there was no reason why the Supreme Court of Pennsylvania could not take judicial notice of it, or at the very least, regard it as a deposition.[73] Moreover, the petitioner has never asserted that he has any additional evidence to present with respect to any relevant and material issue.

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[72] Cf., **Ex Parte Darr**, 84 Okl. Cr. 352, 182 P. 2d 523, which was characterized by Mr. Justice Reed, speaking for the majority in **Darr v. Burford**, 339 U. S. 200, 219, as "obviously careful consideration".

[73] Cf., Section 2246, Revised Judicial Code, 28 U. S.C. 2246:

"Evidence; depositions; affidavits.

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants; or to file answering affidavits."

See **Canizio v. New York**, 327 U. S. 82.

In the Absence of an Express Direction From this Court on the Denial of Certiorari the District Court Should Not Have Entertained the Application

Prior to **Darr v. Burford**, 339 U. S. 200, with possibly one exception in the Third Circuit[74] in which the point does not seem to have been considered, the Circuit Courts of Appeals unanimously adhered to the rule enunciated by this court in **Ex Parte Hawk**, 321 U. S. 114, 118[75] (See cases cited in footnote 23, supra).

The respondent argued in the court below that **Darr v. Burford**, 339 U. S. 200, did not impair the rule enunciated in **Ex Parte Hawk** one iota but had, in fact, actually strengthened it by implication, if not expressly, by asserting, we believe, that in the absence of an express direction to proceed in the appropriate Federal court, as was done in **Burke v. State of Georgia**, 338 U. S. 941 the District Courts should decline to en-

[74] **Kennedy v. Burke**, 3 Cir., 173 F. 2d 544.

[75] "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. * * *"

tertain the application,[76] otherwise the proceedings in the State courts and in this Court by certiorari would be entirely redundant. This would seem to be the logical concomitant of **Frank v. Mangum,** 237 U. S. 309, **Ashe v. Vallotta,** 270 U. S. 424; **Salinger v. Loisel,** 265 U. S. 224, and **Wong Doo v. United States,** 265 U. S. 239. Moreover, unless the respondent's theory is the criterion, the door is wide open to having cases reviewed by this court at least twice[77] and possibly more.

The court below, however, rejected the respondent's argument, and held that the District Court must pass upon the application on the

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[76] "**If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in** Burke v. State of Georgia, 338 U. S. 941, 70 S. Ct. 422, with an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari. If the District Court feels that error may have occurred, it has power to examine the application to see if circumstances exist to justify it in holding a hearing on the merits. Such freedom of action protects the Great Writ without trivializing it." 339 U. S. 215, 216 (Emphasis ours)

[77] This case is an excellent illustration. Five of the eight questions before this court in this proceeding are verbatim with questions raised in the application for certiorari at No. 818 October Term, 1949. (Transferred to No. 70 October Term, 1950)

merits. In effect the court below construed Section 2254 of The Judicial Code as an enlargement of Section 2243. Section 2254 **was not** intended as an **enlargement** of Section 2243, but, on the contrary **a restriction** based on the prior judicial practice predicated on the necessity of the elimination of unseemly conflicts between the State and Federal courts. That seems to be the import of **Darr v. Burford**, 339 U. S. 200. There is no statutory impediment, therefore, to the application of the rule since the enactment of The Judicial Code. The proper exercise of discretion would seem to require that applications to the district courts in similar circumstances should be forthwith declined. Honorable John J. Parker, Chief Judge, United States Court of Appeals for the Fourth Circuit, who participated in the drafting of the section of The Judicial Code relating to habeas corpus, appears to be of the same opinion.[78]

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[78] See **Parker, Limiting the Abuse of Habeas Corpus**, 8 F.R.D. 171, 173-174, 178; Cases cited in footnote 23, supra.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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Assistant Deputy Attorney General,

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Deputy Attorney General,

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IN THE

Supreme Court of the United States

October Term, 1951

No. 669 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,

Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit.

APPENDIX TO BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

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Case Caption

APPENDIX

I.

OPINION, JUDGMENT AND SENTENCE OF THE COURT OF OYER AND TERMINER OF PHILADELPHIA COUNTY AT NO. 384 FEBRUARY TERM, 1948

IN THE COURT OF OYER AND TERMINER OF PHILADELPHIA COUNTY

No. 384 February Term, 1948

Commonwealth of Pennsylvania

vs.

James Smith

Before Guerin, Sloane and Carroll, JJ.

Opinion of Court of Oyer and Terminer

Opinion by Guerin, J. (March 3, 1949):

Shortly after midnight, January 15, 1948, Edward G. Gundaker, Jr., a service man on a tow truck of a taxicab company, was proceeding northwardly on Delaware Avenue, above Bainbridge Street, in the City of Philadelphia, when he observed a taxicab of his employer cut across his path, traveling in a northeasterly direction on Delaware Avenue, at a speed of five to ten miles per hour, in a fashion that led the witness to believe that the brake was on and that it was coming to a stop. It did stop about twenty or thirty yards north of the tow truck. The witness seeing the defendant step from the driver's seat of the taxicab, halted his truck, grabbed a tire tool and approached the defendant on foot. The latter walked at a steady gait toward the witness, and when they met, Gundaker, noticing defendant's nervous condition, grasped him and asked him what was the matter. Defendant said the driver was sick, and Gundaker began walking toward the taxicab, while the defendant jerked and tried to get away. At that time, Barney Magen, driving a taxicab of another company, came up to them, and after an explanation by Gundaker, they looked into the first taxicab and saw the body of its driver, John J. Haines, lying on the front seat with his head toward the right door. On the front seat, to the left of the body of Haines, and approximately under the steering wheel, was a revolver. About two or three

minutes later, a police prowl car arrived at the scene, and Gundaker turned the defendant over to the custody of the police, who later proceeded with him to the police station. While in the police car, defendant dropped several bullets behind the rear seat. They were picked up by one of the officers, who turned them over to the detective division, but these bullets were not produced at the trial.

On the way to the station, one of the officers, who knew defendant, asked him why he had killed the man. Defendant said, "he isn't dead, is he?", and when the officer replied that he was, defendant exclaimed, "Oh, my God, what have I done now?"

Officer Malatesta, the driver of the police prowl car, questioned defendant before he was placed in the police car. Defendant first told him that he entered the cab at pier 46 and when it arrived at this point, the driver slumped. A moment later, he told Malatesta another story—that defendant and another fellow entered the cab at pier 98, and when they got that far, the other fellow got out and the driver slipped off. To this witness, defendant seemed perfectly sober and to know what he was doing.

After his arrival at the police station, defendant was questioned by Detective Lear. Defendant told him that he and another man, described as a Porto

Rican, were in the cab together and that the other man had shot the driver. The detectives took defendant over the territory and to the places described by him in search of the Porto Rican, but without success. Later, at the police station, the detectives questioned defendant further, and he admitted that he had shot the driver, taking his (defendant's) hat, holding it up and shooting through it to muffle the sound. The hat was found on the rear seat of the cab, and was offered in evidence, disclosing the bullet hole. Defendant later changed his story about the bullet hole in his hat, and said that it had been caused by the accidental discharge of the gun in his room at his home. His sister testified to the same effect. The detectives made a thorough search of defendant's room and found no evidence of a bullet hole in the walls or ceiling.

Detective Schwartz, of the homicide division, questioned defendant, and was told the same story about the Porto Rican in the cab, but, after appealing to defendant to tell the truth, since his asserted companion could not be found, defendant then confessed that he had shot the driver. His confession was reduced to writing and signed by him. It appears in toto in the transcript of testimony. Summarized, defendant related that a week before, he had obtained the revolver used in killing Haines as a part of the loot of a robbery in Camden, N. J.

When he brought it to Philadelphia, he purchased cartridges from a neighboring hardware store. The night before the killing, he took the revolver with him when he left home, because he needed some money and thought he would hold somebody up. After wandering through the neighborhood for several hours, in and out of cigar and candy stores, about midnight he went to 5th and South Streets and hired the cab at the stand. He told the driver to take him to Pier 98 (Delaware Avenue and Oregon Avenue), where he entered a cafeteria, ordered a bottle of beer, took a couple of swallows, left, and directed the driver to take him to Delaware Avenue and South Street (21 blocks away). As the cab turned the corner from Bainbridge Street into Delaware Avenue, defendant told the driver it was a hold-up. He pointed the gun at the driver, and as the latter bent over as if reaching for something, defendant shot him, jumped over to the front seat and brought the cab to a stop. He described in detail how he was taken into custody by the driver of the tow truck, and later by the police. He saw a police officer take the gun from the front seat of the cab, using a handkerchief to do so.

Defendant related that he had loaded the gun earlier in the evening after he left a restaurant, because he was going to stick up anybody that came by, as he needed money. It was loaded when he entered the cab at 5th and South Streets. He did

not intend to hold up the cab driver when he entered the cab, but after he left the cafeteria at Pier 98 and re-entered the cab, he had made up his mind to do so.

The spent bullet taken from the head of the deceased was fired from the revolver found on the cab seat, and identified by defendant as the one he had stolen a week prior, and had in his possession when he entered the cab.

The waybill of Haines was offered in evidence, and it recorded a "pick-up" of a passenger at the cab stand 5th and South Streets, but not his discharge, though entries thereon showed the pick-up and the discharge of all other passengers carried by Haines that night. No money or other property had been taken from Haines, and when defendant was searched he had only six cents in his possession.

Defendant took the witness stand and answered a number of questions put to him by his counsel concerning his childhood and his period of service in the army, but when questioned about the events of the night before, and the morning, Haines was shot, he remained silent, despite the repeated efforts of his counsel and the several members of the court to elicit a reply. Defendant constantly kept his chin on his chest, twisted his mouth, wet his lips, clenched and unclenched his hands and squirmed about on the witness chair. So pronounced was his

conduct that the court requested Dr. Drayton to sit in front of the courtroom and observe the defendant.

The court permitted counsel for defendant to state the result of their investigations and interviews with defendant. Defendant had told them that on the night before the killing, he had been to a bar and had something to drink, but did not remember how much; he returned to his home where he remained about an hour, leaving at 7:30 p.m. and taking the gun and bullets with him. He returned to the bar, had some wine and beer, went to another bar where he drank nothing but played the music machine, and then went to the home of a friend, Mildred Wheeler at 505 South Front Street. She set the time of his arrival at just a little after seven o'clock. She testified that defendant came to fix a bed for her. To her, he looked "dopey", and she saw a gun fall from his pocket while he was doing the work. She and a woman friend left defendant in the apartment, suggesting that he lie down before leaving. To the other woman, defendant looked normal. How long he remained there does not appear, but when he left he returned to the neighborhood of his home, had more beer in various taprooms and left to go home, but from that point on his mind has been a blank and still is. When his counsel asked him about what he told the police, defendant said if they saw him there, then he did it but could not remember how or why he did it.

There is nowhere in the record even a suggestion that any duress was practiced upon defendant to extort the confession he made. On the contrary, there is the uncontradicted evidence of the several police officers and the detectives that the confession was made voluntarily, after defendant had been warned of his rights, and at the time he gave every appearance of being sober, normal and knowing what he was saying and doing.

In June, 1945, defendant was arrested in Philadelphia on a charge of larceny of an automobile in New York City, and was returned to that jurisdiction for trial. At the trial, the Kings County Court committed defendant to the Division of Psychiatry of the Kings County Hospital. The latter submitted a written report to the court that defendant was insane, psychosis, schizophrenia, hebephrenic type, and that he was not capable of understanding the charge against him nor of making a defense. He was thereupon committed to the Brooklyn State Hospital on June 18, 1945.

Defendant remained at the Brooklyn State Hospital from June 19, 1945, to October 11, 1945, when he was discharged to be taken to the Department of Correction of the City of New York. The hospital record for that date notes as to defendant: "Condition: Recovered. Diagnosis: Dementia Praecox, Catatonic Type."

Dr. Clarence H. Bellinger, Senior Director of Brooklyn State Hospital, testified that upon admission, defendant was examined and the previous diagnosis was confirmed of dementia praecox, catatonic instead of hebephrenic. He was detained until October 11, 1945, during which time he improved, and was discharged after a personal examination by Dr. Bellinger, who stated that in his opinion defendant was sane, capable of understanding the charges pending against him, and of conferring with counsel in the making of his defense. He was discharged as having recovered from any mental illness he had—"he was clear and lucid."

December 27, 1945, defendant, on his own initiative, entered the Philadelphia General Hospital where he remained until January 4, 1946. At the time of his admission he was in an acutely hallucinatory state following excessive indulgence in alcohol the day before, when he began to hear voices, saw a "headless woman" standing at the foot of his bed, and once she sat on his head and caused his nose to bleed. He began to feel confused and was fearful he would attack and kill anyone who got in his way. He recognized this feeling was dangerous and called a patrol wagon to take him to the Naval Hospital, which sent him to the Philadelphia General Hospital.

At the Philadelphia General Hospital, defendant gave a history of service in the United States Army

from June 26, 1941, to June 29, 1944, when he received a medical discharge. He had served overseas and was a Staff Sergeant wice but was demoted for insubordination. While overseas he was hospitalized twice for a nervous condition and three times for malaria. He related that he was in the Brooklyn State Hospital, after stealing an automobile, having been discharged in 1945.

When defendant was first examined at the Philadelphia General Hospital there was no evidence of hallucinations. He was well oriented and seemed to have a fair amount of insight. He was cooperative and did not appear to be acutely ill. His physical examination and laboratory reports were essentially negative.

While confined to the Philadelphia County Prison (Moyamensing) he was examined by the Medical Director, Dr. Henry F. Page, on March 8, 1948, who reported that defendant was quiet, cooperative, lucid, oriented in all spheres, and in possession of insight into his predicament. He told Dr. Page that he reached grade 11-A in school and left to join the Army where he remained two years, receiving a disability discharge for malaria, and refusing a pension. Since then he had worked at various odd jobs and was then in the trucking business for himself. He stated that he had been arrested three times for stealing cars and twice on suspicion; that

he had no close friends and got along better with whites and foreigners rather than his own kind. He blamed the shooting of the cab driver on a fifth of sherry, on which he had superimposed several beers. At that time there was no evidence of an acute psychosis.

At the request of counsel for the defendant, the court asked Dr. William Drayton, Jr., to examine defendant. Dr. Drayton has been chief of the Philadelphia General Hospital psychiatric department since 1926; neuropsychiatrist of the Municipal Court of Philadelphia since 1922; and is associate professor of neuropsychiatry in the Graduate School of Medicine of the University of Pennsylvania. Dr. Drayton had two interviews with defendant, and testified that defendant was of average mentality.

His history of mental illness, diagnosed schizophrenia, catatonic type, and treatment at the Kings County Hospital and Brooklyn Hospital, as well as his confinement at the Philadelphia General Hospital was made known to Dr. Drayton. He testified that in his opinion defendant showed no evidence of having any psychosis at this time, nor did he believe that he was psychotic when he shot and killed Haines. He described defendant as having a convenient memory loss, and gave his diagnosis of defendant as of average intelligence, no psychosis, psychotically and neurologically negative. He ex-

pressed the opinion that defendant has completely recovered from his mental illness.

Dr. Drayton testified that in his opinion when defendant said he heard voices he was faking; that on January 15, 1948, when he killed Haines, defendant was capable of distinguishing between right and wrong, and of understanding what he was doing.

At the third hearing before the court, defendant sat twitching his lips, kept his eyes downcast, and constantly shifted about in his chair. This conduct was in marked contrast to his behavior at the two prior hearings, when he remained perfectly quiet and at least outwardly composed. On one occasion, he was directed to show tattoo marks to Dr. Bellinger, and he readily understood and followed the instructions of his counsel. Dr. Drayton's attention was called to defendant's actions, and he described them as an exhibition, and not the acts of an insane man.

The prison guard, who brought defendant to the courtroom four times and to Dr. Drayton twice, testified that on none of those occasions had defendant shaken his shoulders, rubbed his nose, and worked his hands and his lips as he had done in court on the third day of his trial. He walked, talked and behaved quietly and naturally.

Defendant was born February 2, 1925, and was twenty-three years old when he killed Haines. While

he did not enjoy the uninterrupted discipline of a father, who was separated off and on for a number of years from his mother, he lived with either parent, or with his maternal grandfather during his early youth. With him, lived his mother, step-brother and two sisters. His mother and one sister testified at his trial. At the age of five, he recovered from blindness accidentally suffered when a baby. As he grew, his behavior was normal and he got along well with his family and playmates. Sometimes he drank, but his mother did not often see him intoxicated. On one occasion, the date of which was not given, she came downstairs at 6:00 o'clock in the morning and saw him sitting on a chair and acting as he did on the third day of his trial.

March 6, 1947, defendant was placed on trial in Philadelphia on a charge of burglary. He had been found asleep in a neighborhood garage and was sentenced to thirty-two days to twenty-two months in the County Prison.

Defendant's sister testified that he drank two or three times a week if he had the money, and was addicted to smoking marihuana cigarettes. She saw him return to the house about 5:00 o'clock the evening before he shot Haines; he remained a few minutes, and went out again, but she did not observe his condition at the time.

While attending school in New Jersey, and when he was about the age of nine, he was arrested for

stealing a bicycle belonging to the daughter of his teacher, and was sent to a reform school for several months.

There is not the slightest room for doubt that this was murder of the first degree. The homicide was a felonious killing with malice aforethought, and, therefore, murder; and it was a murder committed in attempting to perpetrate a robbery, and hence murder of the first degree.

Defendant's counsel concede that the offense was murder of the first degree, but contend that a life sentence rather than death is warranted. In support of their position, they cite defendant's "mental history and his childhood buffetings and waywardness," and urge upon the court that if defendant was legally sane, he was mentally unhealthy and unstable. This contention completely overlooks the facts immediately preceding and leading up to the killing and defendant's arrest. There was nothing wrong with defendant's mental processes when he armed himself with the revolver and cartridges the night before he murdered Haines, with the intention as he confessed of holding up someone, because he needed money. He went to his friend's house and fixed her bed, and rested there awhile before setting out on his nefarious path which led to the cab driver's death. His mind was sufficiently acute for him to direct Haines to Delaware Avenue, probably one of the quietest and most deserted spots in Philadelphia

at midnight. He was alert enough to fire one shot in the back of the head, destroying the brain, making it improbable that it would arouse any who might by chance be passing by. He waited until the cab had slowed to 5 to 10 miles per hour, so that it would be a simple matter for him to climb into the front seat, turn off the ignition and bring the cab to a complete stop. Had it not been for the unexpected but timely presence almost immediately of Gundaker and Magen, he might have completed his murderous act and robbery and perhaps never have been brought to justice.

He was quick to recognize the futility of attempting to escape when he saw the tire wrench in Gundaker's hand, and was sharp enough to drop five bullets back of the seat of the police car. When questioned immediately at the scene of his crime, his mind was keen enough first to blame the killing upon a fictitious unknown companion who had escaped, and he admitted seeing the police officer pick the revolver from the cab seat using a handkerchief to do so.

We are more impressed with these natural, spontaneous evidences of defendant's mentality at the time he committed this crime, than we are with the vigorous, able and earnest efforts of counsel to cloak this defendant with a mantle of mental deficiency and irresponsibility based upon what might be termed isolated, or, at least, widely separated

periods of some degree of mental instability. We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing. More than two years elapsed after defendant's discharge from the Brooklyn State Hospital as recovered, and it was just about two years after he had himself committed to the Philadelphia General Hospital for alcoholic hallucinosis, that he committed this crime. There is no evidence of institutional or medical treatment in this time, nor is there anything in the record to indicate the need thereof. At two hearings before this court, defendant was quiet, attentive and cooperative. As we have pointed out above, when asked to bare his arm for Dr. Bellinger, he instantly obeyed the instruction of counsel, stood, removed his coat, raised his sleeve, and resumed his seat after identification was made by Dr. Bellinger.

We accept the statement and opinion of Dr. Drayton, based upon his professional experience and contact with, and observation of, this defendant, buttressed by the evidence of our own senses, that this defendant is an exhibitionist, who faked abnormalities, and who suffers a convenient loss of memory. He knew well enough to relate in detail the

events of his past life, including the details of his Army experiences, to the doctors at the Kings County Hospital, Brooklyn State Hospital, Philadelphia General Hospital, Philadelphia County Prison, and to Dr. Drayton, but when asked about the murder and his confession, he affected not to remember anything about them.

In Commonwealth v. Taranow, 359 Pa. 342, defendant entered a plea of guilty to an indictment charging him with murder. The court en banc (composed of three judges) adjudged the crime to be murder in the first degree and fixed the penalty at death. From the evidence, it appeared that defendant shot and killed the driver of an automobile in motion, in which defendant had "thumbed" a ride. It was urged that life sentence should have been imposed by the lower court, rather than the sentence of death, because psychiatric experts had testified that defendant was emotionally unstable and a psychopathic personality. All witnesses agreed that at the time of the commission of the offense, and at the trial, defendant was sane. The Supreme Court rejected this contention, holding that the court below did not abuse its discretion when it fixed the death penalty, pointing out that defendant's alleged deviation from normal mentality was not such as to justify interposing a defense of insanity, and this carried with it an admission that defendant possessed the mental capacity necessary to enable him

to distinguish between right and wrong and sufficient to render him legally answerable for the consequences of his intended conduct. There, defendant's own detailed account of the killing and of his actions on the preceding day or two established beyond question that he was intent upon robbery by force of arms, if necessary—here, defendant's voluntary confession, reciting the taking of the revolver and bullets with him the night before, because he intended to hold up somebody since he needed some money, conclusively persuades the court of his wickedness of purpose.

Answering the contention that defendant's disrupted family background should mitigate the punishment for his offense, we quote the language of Chief Justice Maxey in his concurring opinion in Commonwealth v. Chapman, 359 Pa. 164, 172:

> "Most criminals have unfortunate family histories but society's need of protection from criminals regardless of their family history is the paramount consideration of the courts."

We have given this case our most earnest, serious, and extended thought and consideration. We are unanimously of the opinion that no mitigating circumstances have been shown which would warrant the imposition of less than the extreme penalty. On the contrary, defendant's conduct shows a reckless

disregard for the consequences, and callous, wanton destruction of human life.

The Act of June 24, 1939, P. L. 872, Sec. 701, 18 PS sec. 4701 provides that

> "In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life."

We have determined the crime to be murder of the first degree, and, in the exercise of our discretion, have imposed sentence of death.

Opinion of Court of Oyer and Terminer
Judgment and Sentence

JUDGMENT AND SENTENCE

And now, Friday, February 4, 1949, the sentence of the law is that you, James Smith, be taken hence by the Sheriff of Philadelphia County to the jail of that county from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and the application of such current to be continued until you are dead.

CHARLES L. GUERIN,
Judge.

II.

OPINION, SUPREME COURT OF PENNSYLVANIA ON THE DIRECT APPEAL AT NO. 137 JANUARY TERM, 1949

(Reported at 362 Pa. 222, 66 Atl. 2d 764)

In the Supreme Court of Pennsylvania

Eastern District

No. 137 January Term, 1949

Commonwealth

v.

Smith, *Appellant.*

Opinion by Mr. Chief Justice Maxey, June 24, 1949:

This is an appeal based upon alleged abuse of discretion by the court below in imposing the death penalty after appellant's plea of guilty of murder. James Smith pleaded guilty to an indictment charging him with the murder of John J. Haines on September 21, 1948, in Philadelphia. On the same

day he was adjudged guilty of murder in the first degree by the court en banc, composed of Judges Charles L. Guerin, Joseph Sloane and Vincent A. Carroll.

The victim, John J. Haines, was a taxicab driver. He was found shot through the back of his head, slumped on the front seat of his cab, bleeding, shortly after midnight, on January 15, 1948, on Delaware Avenue near South Street, Philadelphia. Edward G. Gundaker, Jr., was operating a tow truck in the vicinity when he saw appellant emerging from the cab, apprehended him, and turned him over to the police. Appellant admitted that he had shot Haines and signed a statement admitting that the gun he used in the killing was one he had obtained in a robbery in Camden, New Jersey; that around midnight on January 14th he determined to rob someone, hailed a cab, and, later, intending to rob the driver, shot and killed him. When he was asked: "When you told the cab driver that it was a holdup, did the cab driver say anything to you?" Smith answered: "No, sir. I had the gun pointed at him. He didn't say anything."

The defense called as a witness Dr. Fred Adams, a New York psychiatrist, connected with the Kings County Hospital, Kings County, New York. He testified that during May or June, 1945, at the request of the Kings County Court, he and Dr. Gladys

McDermaid, also a psychiatrist, examined appellant and diagnosed him as "psychosis. Schizophrenia. Hebephrenic type"; that this type of schizophrenia is a "mental disturbance characterized usually by illusions, delusions, hallucinations referable to the idea of persecution or grandeur"; that this diagnosis was aided by the findings of a psychologist, Dr. Samuel Machover. On the basis of these findings, they submitted to the Court that appellant was "presently insane, not imbecile and is not capable of understanding the charge against him, the proceedings against him and of making his defense". Defendant was then committed by the Court to the Brooklyn State Hospital for treatment of his mental condition. When questioned by the court Dr. Adams testified that when examined in 1945, the appellant did not know the difference between right and wrong.

Dr. Bellinger was also called by appellant. He is the Senior Director of Brooklyn State Hospital, in Brooklyn, New York. He testified that hospital psychiatrists examined the appellant and substantially confirmed the previous diagnosis, except that they concluded the type to be catatonic rather than hebephrenic. Dr. Bellinger stated that appellant was detained until October 11, 1945, "when he was discharged to the Department of Correction of the City of New York after I had personally examined him and found him to be, in my opinion, sane and capable of understanding the charges pending

against him and of conferring with counsel in the making of his defense [for stealing an automobile]. I reported of record that I examined this young man myself on the 9th of October and I certified to the Committing Judge and the District Attorney of Kings County the fact that he had recovered to the extent that he was able to confer with counsel, understand the nature of the charges against him, and he was discharged to the Department of Correction as having recovered from any mental illness which he had. He was clear and lucid." Dr. Bellinger also stated that appellant, when discharged on October 11, 1945, "was cured and knew the difference between right and wrong".

By agreement and order of the Trial Court, a letter from the Philadelphia General Hospital was received in evidence. It refers to appellant's admission to the psychopathic Department in December 1945. This letter, dated April 28, 1948, which is signed by Dr. Albert J. Kaplan, Assistant Chief of Neuropsychiatric Department, says James Smith (this appellant) "was admitted in an acutely hallucinatory state following excessive indulgence in alcohol the day prior to admission." The letter states that: "His past history reveals that he was in the Army from 6-26-41 to 6-29-44, and he was discharged for medical reasons (probably nervousness; actual cause unknown). He had served overseas in the C. B. I. theatre of operation, was a

Staff Sergeant twice but was demoted because of insubordination. While overseas he was hospitalized twice because of 'nervous observation' for a nervous condition and three times for malaria." The letter continues: "When first examined in this hospital, there was no evidence of hallucinations. Patient was well oriented and seemed to have a fair amount of insight. He was cooperative and apparently did not appear acutely ill." The letter refers to a note by the Assistant Chief of Service, Dr. A. Leanman, which has the following comments: "Patient has heard two voices since 1943; one tells him to 'do good' and the other tells him to 'do bad'. He has amnesia periods when he finds himself in different parts of town at which time he wants to hurt someone (admission note says he is homicidal). He gets into fights easily. He states he was in the Army for three years, overseas two years, got into minimum trouble. Recently released from Brooklyn State Hospital for 'same thing; they said I took an automobile but I don't remember it.'"

At the request of Judge Guerin the defendant had been examined a few days before November 5, 1948, by Dr. William Drayton, Jr., and his testimony is as follows: "The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at

this time, nor do I believe that he was psychotic when he shot and killed John J. Haines . . .." When Dr. Drayton was asked: "What is your diagnosis?", he answered: "He is of average intelligence, no psychosis; psychotically and neurologically negative." Dr. Drayton said that as far as he could tell, the defendant had completely recovered from any mental illness of which there had been any prior history. He was asked: "At the time you examined him did he appreciate the difference between right and wrong?" His reply was: "he answered my question, 'What happens to a person who kills,' life for life. He said wrong to kill and he said he didn't kill anybody." When asked: "Would you say this man when he says he hears voices is a faker?", he replied: "I think he is a faker." When asked: "You are not quite entirely convinced that this man is sane?", he replied: "I believe that he is sane." Judge Carroll asked Dr. Drayton the following question: "In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?" He replied: "I believe he was."

The court in its opinion in this case said, inter alia: "Defendant's counsel concede that the offense was murder of the first degree, but contend that a life sentence rather than death is warranted. In support of their position, they cite defendant's 'mental history and his childhood buffetings and

waywardness,' and urge upon the court that if defendant was legally sane, he was mentally unhealthy and unstable. This contention completely overlooks the facts immediately preceding and leading up to the killing and defendant's arrest. There was nothing wrong with defendant's mental processes when he armed himself with the revolver and cartridges the night before he murdered Haines, with the intention as he confessed of holding up someone, because he needed money. He went to his friend's house and fixed her bed, and rested there awhile before setting out on his nefarious path which led to the cab driver's death. His mind was sufficiently acute for him to direct Haines to Delaware Avenue, probably one of the quietest and most deserted spots in Philadelphia at midnight. He was alert enough to fire one shot in the back of the head, destroying the brain, making it improbable that it would arouse any who might by chance be passing by. He waited until the cab had slowed to 5 to 10 miles per hour, so that it would be a simple matter for him to climb into the front seat, turn off the ignition and bring the cab to a complete stop. Had it not been for the unexpected but timely presence almost immediately of Gundaker and Magen, he might have completed his murderous act and robbery and perhaps never have been brought to justice. He was quick to recognize the futility of attempting to escape when he saw the tire wrench in Gundaker's hand, and was

sharp enough to drop five bullets back of the seat of the police car. When questioned immediately at the scene of his crime, his mind was keen enough first to blame the killing upon a fictitious unknown companion who had escaped, and he admitted seeing the police officer pick the revolver from the cab seat using a handkerchief to do so."

The court then said: We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing. More than two years elapsed after defendant's discharge from the Brooklyn State Hospital as recovered, and it was just about two years after he had himself committed to the Philadelphia General Hospital for alcoholic hallucinosis, that he committed this crime. There is no evidence of institutional or medical treatment in this time, nor is there anything in the record to indicate the need thereof. At two hearings before this court, defendant was quiet, attentive and cooperative. As we have pointed out above, when asked to bare his arm for Dr. Bellinger, he instantly obeyed the instruction of counsel, stood, removed his coat, raised his sleeve, and resumed his seat after identification was made by Dr. Bellinger." The court concluded with this statement: "We have determined the

crime to be murder of the first degree, and, in the exercise of our discretion, have imposed sentence of death."

We find no abuse of discretion in this case. The judgment is affirmed and the record is remitted to the court below so that the sentence imposed may be carried out.

III.

RETURN OF WARDEN OF WESTERN STATE PENITENTIARY IN THE HABEAS CORPUS PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA AT NO. 9 MISCELLANEOUS DOCKET 302, EASTERN DISTRICT

In the Supreme Court of Pennsylvania
Eastern District

No. 302 Misc. Docket No. 9

Commonwealth, ex rel. James Smith

v.

Stanley P. Ashe, Warden, Western State Penitentiary, and Dr. Frederick S. Baldi, Superintendent Philadelphia County Prison

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RETURN BY WARDEN OF WESTERN STATE PENITENTIARY

And now, this 6th day of December, 1949, comes Stanley P. Ashe, Warden, Western State Penitentiary and makes the following return:

1. That he is Warden of Western State Penitentiary.

2. That James Smith was received into his custody at the Rockview Prison, Western State Penitentiary, Rockview, Centre County, Pennsylvania, on September 24, 1949, pursuant to a judgment and sentence of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, and the warrant of the Governor of Pennsylvania issued pursuant to the provisions of the Act of June 19, 1913, P. L. 528, 19 PS Section 1121 et seq.

3. That pursuant to a writ of habeas corpus issued by the United States District Court for the Eastern District of Pennsylvania at Misc. No. 1334, the said James Smith was procured by your affiant before said Court on Tuesday, October 4, 1949.

4. That pending the disposition of the said habeas corpus proceedings in the said United States District Court the relator, pursuant to the Order of said Court, was confined in the Philadelphia County Prison.

5. That the said Court dismissed the said writ of habeas corpus.

6. That James Smith served notice of his intention to perfect an appeal from the said Order of the said United States District Court to the United States Court of Appeals for the Third Circuit, upon the Attorney General of Pennsylvania, counsel for your affiant.

7. That on the 22nd day of November, 1949, the United States District Court for the Eastern District of Pennsylvania entered an Order remanding the said James Smith into the custody of the Warden of the Philadelphia County Prison, and that the said James Smith is there confined, pursuant to said Order.

8. That attached hereto and made a part hereof, is the original record of the Court of Oyer and Terminer, Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, and a copy of the record of the appellate proceedings before your Honorable Court at No. 137 January Term, 1949, sub nom Commonwealth v. James Smith, and a true and correct copy of the record of the proceedings before the United States District Court for the Eastern District of Pennsylvania, sub nom United States ex rel. James Smith v. Warden Western State Penitentiary.

(s) STANLEY P. ASHE,
Warden, Western State Penitentiary.

Commonwealth of Pennsylvania
County of Dauphin ss:

Before me, a Notary Public in and for said State and County, personally appeared Stanley P. Ashe,

Warden of Western State Penitentiary, who being duly sworn according to law deposes and says that the facts alleged in the foregoing Return are true and correct, to the best of his knowledge, information and belief.

(s) STANLEY P. ASHE,
Warden, Western State Penitentiary.

Sworn to and subscribed before me this 1st day of December, 1949.

(s) Lucille A. Stroup,
(Seal) *Notary Public.*

My Commission expires Mar. 5, 1951.

IV.

PETITION BY J. W. CLAUDY, WARDEN OF WESTERN STATE PENITENTIARY, FOR LEAVE TO INTERVENE AS PARTY RESPONDENT IN THE DISTRICT COURT

In the United States District Court
(Eastern District of Pennsylvania)

No. 1408

United States of America ex rel. James Smith
v.
Dr. Frederick S. Baldi, Superintendent,
Philadelphia County Prison

PETITION FOR LEAVE TO INTERVENE AS RESPONDENT

To the Honorable, the Judges of Said Court:

The petition of J. W. Claudy, Warden of the Western State Penitentiary by Charles J. Margiotti,

Attorney General of Pennsylvania, respectfully represents:

1. That J. W. Claudy is the Warden of the Western State Penitentiary.

2. That on the 20th day of July, 1949, Honorable James H. Duff, Governor of Pennsylvania, issued a warrant to Stanley P. Ashe, Warden of the Western State Penitentiary, to execute, during the week beginning Monday, the 26th day of September, 1949, a sentence of death imposed upon the relator in this proceeding by the Court of Oyer and Terminer of Philadelphia County on an indictment at No. 384 February Term 1948, charging murder.

3. That the relator was delivered into the custody of the Warden of the Western State Penitentiary at Rockview, Centre County, Pennsylvania, on Saturday, the 24th day of September, 1949.

4. That on the same day, to wit, Saturday, the 24th day of September, 1949, your Honorable Court in proceedings at No. M1334, granted a writ of habeas corpus to the relator, stayed execution and ordered his production before your Honorable Court on Tuesday, the 4th day of October, 1949.

5. That in obedience to the order of your Honorable Court, the relator was produced by the Warden of the Western State Penitentiary, Stanley P. Ashe, before your Honorable Court on Tuesday, the

4th day of October, 1949, as directed in the said order.

6. That by order of your Honorable Court, the relator was placed in the custody of the Warden of the Philadelphia County Prison pending termination of the proceedings at No. M1334, supra.

7. That thereafter your Honorable Court entered an order discharging the writ which order was appealed to the United States Court of Appeals for the Third Circuit at No. 10141, which affirmed the order of your Honorable Court discharging the writ.

8. That although the order of your Honorable Court remanding the relator to the custody of the Warden of the Philadelphia County Prison pending termination of the proceedings at No. M1334 was automatically dissolved when the Circuit Court of Appeals affirmed the order of your Honorable Court discharging the writ, the relator was left by the Warden of the Western State Penitentiary, Stanley P. Ashe, at the Philadelphia County Prison pending the termination of habeas corpus proceedings instituted in the Supreme Court of Pennsylvania for the reason that it was believed to be a more humanitarian course than to return the relator to the "death house" at Rockview, Centre County, Pennsylvania.

9. That the petitioner, J. W. Claudy, is, under the laws of the Commonwealth of Pennsylvania, the

legal custodian of the relator and, therefore, has the paramount right to his custody.

Wherefore the petitioner prays your Honorable Court for leave to intervene as a respondent in the above captioned cause. And he will ever pray, etc.

(s) CHARLES J. MARGIOTTI,
Attorney General of Pennsylvania,

By: (s) RANDOLPH C. RYDER,
Deputy Attorney General.

V.

ANSWER TO PETITION

In the United States District Court for the Eastern District of Pennsylvania

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No. 1408

United States of America
ex rel. James Smith
v.
Dr. Frederick S. Baldi, Superintendent,
Philadelphia County Prison

ANSWER TO PETITION FOR LEAVE TO INTERVENE AS RESPONDENT

To the Honorable, the Judges of Said Court:

James Smith, Relator, by his attorney, Thomas D. McBride, makes Answer as follows:

1. Admitted.
2. Admitted.

3. Admitted, with the qualification that Relator was not delivered into the custody of the Warden of the Western State Penitentiary on September 24, 1949 until some time after this Court had on the same day issued a writ of habeas corpus directing that the body of Relator be produced before this Court; and with the further qualification that at the moment the writ issued Relator was still in the custody of agents of the Superintendent of the Philadelphia County Prison, Dr. Frederick S. Baldi, and Dr. Baldi was at said time within the Eastern District of Pennsylvania.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted, with the qualification that the writ was discharged on the ground that this Court lacked territorial jurisdiction, Relator having been beyond the territorial limits of the Eastern District of Pennsylvania at the moment the writ issued.

8. It is admitted that Relator remained at the Philadelphia County Prison and is still there. It is further admitted that it would have been inhumane to return Relator to the death house at Rockview, Centre County, Pennsylvania, under the circumstances. Relator denies that either these averments of fact or the conclusions of law stated in paragraph 8 of the petition are material.

9. Relator does not know what is meant by the statement that petitioner, J. W. Claudy, "has the paramount right to" Relator's custody, but it is denied that the said J. W. Claudy has any right whatever to Relator's custody. At the time Relator filed his petition and since then up until the present moment, Relator was and is being held by Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison at said Prison, which is within the territorial jurisdiction of your Honorable Court.

10. It is averred that on October 9, 1950, this Court issued a rule to show cause why a writ of habeas corpus should not be granted to Relator and that on that same day a copy of this rule was served upon Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison in whose custody Relator then was and is, directing him to produce the body of the Relator before this Court.

Wherefore Relator prays your Honorable Court to deny petitioner leave to intervene.

JAMES SMITH,
By: THOMAS D. MCBRIDE.

Commonwealth of Pennsylvania,
County of Philadelphia ss:

Thomas D. McBride, being duly sworn according to law, deposes and says that he is attorney for

Relator, and that the facts set forth in the foregoing Answer are true and correct.

(s) THOMAS D. MCBRIDE.

Sworn to and subscribed before me this 26th day of October, A. D. 1950.

Martha A. Rau,
Notary Public.

My commission expires January 7, 1951.

VI.

BRIEF SUR PETITION FOR LEAVE TO INTERVENE

In the United States District Court
For the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith
Relator

vs.

Dr. Frederick S. Baldi, Superintendent of
Philadelphia County Prison
Respondent

BRIEF SUR PETITION OF WARDEN OF WESTERN STATE PENITENTIARY FOR LEAVE TO INTERVENE AS RESPONDENT

STATEMENT

This is a Petition by J. W. Claudy, Warden of the Western State Penitentiary for leave to intervene

as a party respondent in the above captioned cause —a habeas corpus proceeding challenging the constitutional validity of a criminal judgment pursuant to which the relator had been delivered to the petitioner for the execution of the sentence of death imposed on the judgment which execution was interrupted by litigation in this court and in the Supreme Court of Pennsylvania and the Supreme Court of the United States.

The relator was sentenced to death on an indictment in the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948 (see Exhibit 1). The judgment and sentence was affirmed by the Supreme Court of Pennsylvania in an opinion reported at 362 Pa. 222, 66 Atl. 2d 764. The Governor of Pennsylvania issued a warrant to the Warden of the Western State Penitentiary directing him to carry out the sentence imposed by the Court of Oyer and Terminer of Philadelphia County during the week of September 26, 1949 (see Exhibit 2). The Pennsylvania Board of Pardons, on September 21, 1949, denied an application for commutation of the death sentence. On the following day, the Warden of the Western State Penitentiary directed the Superintendent of the Philadelphia County Prison to deliver the relator into his custody at the electrocution building of the Western State Penitentiary, Rockview, Centre County, Pennsylvania, where "He shall remain until the penalty of

death has been legally inflicted or until lawfully discharged from my custody" (see Exhibit 3). The relator was received into the custody of the Warden of the Western State Penitentiary at Rockview, Centre County on September 24, 1949 (see Exhibits 4 and 5).

On the same day, to-wit, September 24, 1949, the United States District Court for the Eastern District of Pennsylvania, per Welsh, District Judge, granted a writ of habeas corpus at M. 1334, directing the Warden of Western State Penitentiary to produce the relator before your Honorable Court at Philadelphia on October 4, 1949 (see Exhibit 6). This writ was complied with by the Warden of the Western State Penitentiary. On that date, after a hearing before the court en banc, Chief Judge Kirkpatrick, announced orally from the bench that the relator would be remanded to the custody of the Warden of the Philadelphia County Prison pending termination of the proceeding at M. 1334.

The writ was subsequently discharged (see 87 F. Supp. 339), and the relator was "remanded to custody" (see Exhibit 7). Thereafter, on November 22, 1949, Chief Judge Kirkpatrick entered an order remanding the relator into the custody of the Warden of the Philadelphia County Prison pending review of the judgment of your Honorable Court by the Circuit Court of Appeals (see Exhibit 8).

The judgment of the District Court was affirmed (see 181 F. 2d 847). In the meantime, habeas corpus proceedings were instituted in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 against Stanley P. Ashe, Warden of the Western State Penitentiary and Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison. The writ was refused (see 364 Pa. 93, 71 Atl. 2d 107) and certiorari denied by the Supreme Court of the United States on Monday, October 9, 1950[1] and on the same day, viz., October 9, 1950 the instant proceedings were instituted against Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison. District Judge Welsh issued a Rule To Show Cause and granted a stay of execution of the sentence.

Following a receipt of a copy of the Petition and Rule, a Petition was filed by the Attorney General of Pennsylvania in behalf of J. W. Claudy, Warden of the Western State Penitentiary for leave to intervene as a party respondent. The relator has filed an Answer praying that the Petition for leave to intervene be dismissed.

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[1] The relator was permitted, for humane reasons to remain at the Philadelphia County Prison pending the termination of the proceedings in the Supreme Court of the United States to secure a review of the decision of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302.

QUESTION PRESENTED

Whether the Warden of the Western State Penitentiary to whom a prisoner convicted of murder and sentenced to death has been delivered for execution of the sentence which was interrupted by proceedings in the United States District Court for the Eastern District of Pennsylvania and the Supreme Court of Pennsylvania and the Supreme Court of the United States during which the prisoner was detained in the Philadelphia County Prison part of the time under orders of the Federal Courts and part of the time (i.e. after the termination of the proceedings in the Federal Courts (April 26, 1950) and while the Supreme Court of the United States had under consideration the application for certiorari) for humane reasons, should not be allowed to intervene, as a party respondent, in a habeas corpus proceeding in the United States District Court for the Eastern District of Pennsylvania challenging the validity of the criminal judgment pursuant to which the prisoner was initially delivered into his custody?

STATUTES INVOLVED

Act of the General Assembly of Pennsylvania of June 19, 1913, P.L. 528, 19 PS 1121-1130.

"Section 1. Be it enacted, &c., That every person, his aiders, abetters, and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in the manner herein provided, and not otherwise. Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or deputy warden of the Western penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the now Western Penitentiary are to be Built." 19 PS 1121.

"Section 2. Whenever any person shall have been convicted and sentenced to death, the clerk of the court where such conviction shall have taken place shall transmit to the Governor of the Commonwealth a full and complete transcript of the record of such trial and conviction, within thirty days after sentence, or, in the event of an appeal, within twenty days after the final disposal of the cause upon such appeal." 19 PS 1122.

"Section 3. After the receipt of the said record the Governor of the Commonwealth shall issue his warrant, directed to the warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said penitentiary, within the week to be named in said warrant, and in the manner prescribed by law." 19 PS 1123.

"Section 4. **Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary.** During such confinement no person except the officers of such penitentiary, the counsel of such convict, and a spiritual adviser selected by such convict, or the members of the immediate family of such convict, shall be allowed access to such convict without an order of said court or a judge thereof." 19 PS 1124 (Emphasis supplied)

SUMMARY OF ARGUMENT.

Under Sections 1, 2, 3 and 4 of the Act of 1913, supra, 19 PS 1121-1134, the relator lawfully came into the custody of the Warden of the Western State Penitentiary which custody, under Section 4, continues, regardless of the place of detention "until the penalty of death shall be inflicted, or until lawfully discharged from such custody". The Superintendent or Warden of the Philadelphia County Prison, as the case may be, although in control of the present place of the relator's detention, are, in so far as he is concerned, merely the agents of the Warden of the Western State Penitentiary. Since, therefore, the Warden of the Western State Penitentiary has, under the laws of Pennsylvania, the paramount right to the relator's custody he unquestionably should be jointed as a party respondent. He was so joined in the former proceedings in this court at M. 1334 and in the proceedings in the Supreme Court of Pennsylvania. Consistency as well as the law, requires his joinder as a party respondent in this proceeding.

ARGUMENT

1. Under the law of Pennsylvania, the custody of a prisoner convicted of murder and sentenced to

death who has been delivered to the Warden of the Western State Penitentiary is, until the sentence has been executed or he has been lawfully discharged therefrom, in the custody of the Warden of the Western State Penitentiary regardless of the place of confinement.

The provisions of Section 4 of the Act of 1913, supra, 19 PS 1124[2] are so unmistakedly clear that it hardly requires any argumentative exposition of the logical soundness of the asserted proposition. Admittedly, the relator has not been lawfully discharged from the custody of the Warden of the Western State Penitentiary. Strictly speaking, when the judgment of your Honorable Court was affirmed by the Circuit Court of Appeals on April 26, 1950 the Warden of the Western State Penitentiary probably should have immediately returned the relator to the "death house", Rockview, Centre

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[2] "Section 4. **Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary. * * *"** (Emphasis supplied.)

County. At that time, however, proceedings in the Supreme Court of the United States to review the judgment of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 had either been or were about to be instituted. Consequently, there was a possibility that several months would elapse before the matter was finally adjudicated. The Warden of the Western State Penitentiary was of an opinion that it would be very inhuman to confine the relator in the "death house" for such an indefinite period of time and, therefore, simply allowed him to remain in the Philadelphia County Prison. Such action or inaction, however, engendered as it was by a charitable solicitation for the welfare and interest of the relator, could not possibly operate to divest the Warden of the Western State Penitentiary of the custody which the positive command of Section 4 of the Act of 1913, supra, confers upon him.

Since, therefore, the Warden of the Western State Penitentiary is the legal custodian of the relator, and, since, by hypothesis, the officials in charge of the Philadelphia County Prison are, in so far as this relator is concerned, acting only as his agent, it is submitted he should be made a party respondent in this proceeding.

2. The joinder of the Warden of the Western State Penitentiary as a party respondent will not affect the jurisdiction of this court.

It is difficult to perceive why the relator should object to the allowance of the petition to the Warden of the Western State Penitentiary for leave to intervene as a party respondent unless, out of a desire to avoid some imaginary objection to the assumption of jurisdiction on the merits. Had there been that possibility, the petition would not have been filed for the Commonwealth of Pennsylvania feels that further delay in the termination of this litigation is incompatible with the efficient administration of criminal justice.

Unquestionably the proceeding had to be instituted in the Eastern District of Pennsylvania. Ambers v. Clark, 335 U.S. 188, 68 S.C. 1443 (1948). The allowance of the petition to intervene would present no question concerning this court's jurisdiction over the person of the Warden of the Western State Penitentiary for, by his very action, he is bringing himself within its jurisdiction (Cf. United States ex rel. Goodman v. Roberts (C.C.A. 2, 1946), 152 Fed. 2d 841, 842).[3] Indeed, if the contention made for

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[3] "* * * The writ was returnable on May 4th. It is clear that prior to that time there had been no valid service of the writ. On the return day an assistant United States attorney made application on behalf of the respondent for an extension of time to file the respondent's return, and stated that the writ had not been served and that custody of the inductee, would

in the first portion of this argument is sound, and it is submitted that it is, intervention by the Warden of the Western State Penitentiary as a party respondent in this proceeding would appear to be essential to the elimination of a possible jurisdictional defect.

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be disputed. The court granted an extension until May 7, on which date the return was filed and the hearing had. The appellant contends that this application for extension constituted a general appearance and a submission of the respondent to the jurisdiction of the court. Arguendo, we may assume this to be true, but it will not aid the appellant on the issue of custody. A general appearance on May 4, would have only the same effect as actual service at the time, and by that date the inductee was beyond the jurisdiction of the court and no longer subject to Major Roberts' orders, as the facts about to be stated clearly show."

CONCLUSION

Under the Act of 1913, supra, the Warden of the Western State Penitentiary is the legal custodian of the relator, and he should, therefore, be joined as a party respondent in this proceeding.

Respectfully submitted,

COLBERT C. MCCLAIN,
Assistant District Attorney,

JAMES W. TRACY, JR.,
First Asst. District Attorney,

RANDOLPH C. RYDER,
Deputy Attorney General,

HARRINGTON ADAMS,
Deputy Attorney General,

CHARLES J. MARGIOTTI,
Attorney General.

Brief Sur Petition for Leave to Intervene

EXHIBIT 1

In the
Court of Oyer and Terminer and General Jail
Delivery of the County of Philadelphia

February Term, 1948, No. 384
Sur charge of Murder

The Commonwealth of Pennsylvania
vs.
James Smith

And now, Friday February 4th 1949, the sentence of the law is that you, James Smith be taken hence by the Sheriff of Philadelphia County to the jail of that county from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and

the application of such current to be continued until you are dead.

Charles L. Guerin,
Judge.

In Witness Whereof, I have hereunto set my hand and the seal of the said Court, this 4th day of February A. D., 1948.

Nathan Ciples,
Pro Clerk.

EXHIBIT 2

In the Name and By Authority of the
Commonwealth of Pennsylvania
Executive Department

To Stanley P. Ashe, Esquire,
Warden of the Western Penitentiary, or your successor in office, Greeting:

Whereas, At a Court of Oyer and Terminer and General Jail Delivery held at Philadelphia, in and for the County of Philadelphia, 384 Feb. Term, 1948, a certain James Smith, on the 21st day of September, Anno Domini one thousand nine hundred and forty-eight pleaded guilty to an indictment charging him with murder; whereupon the court determined the degree of the crime to be murder in the first degree, 4th day of February, Anno Domini one thou-

sand nine hundred and forty-nine imposed the sentence of death; such punishment to be inflicted by the Warden or Deputy Warden of the Western Penitentiary by causing to pass through the body of said convict a current of electricity of intensity sufficient to cause death, the application of such current to be continued until said convict is dead.

Now Therefore, This is to command, authorize and require you, the said Stanley P. Ashe, Warden of the Western Penitentiary, as aforesaid, or your successor in office, to cause the sentence of the said Court of Oyer and Terminer and General Jail Delivery to be executed upon the said James Smith within the week beginning Monday, the 26th day of September, Anno Domini one thousand nine hundred and forty-nine, in the manner prescribed by the Act of General Assembly of this Commonwealth, entitled "An Act fixing the penalty for murder of the first degree; regulating the procedure incident to the infliction thereof; prescribing and providing for a place and manner of inflicting said penalty on the grounds of the new Western Penitentiary of this Commonwealth in Centre County," etc., approved the nineteenth day of June, Anno Domini one thousand nine hundred and thirteen, and for so doing this shall be your sufficient warrant.

Given under my hand and the Great Seal of the State, at the City of Harrisburg, this 20th day of

July in the year of our Lord one thousand nine hundred and forty-nine and of the Commonwealth the one hundred and seventy-fourth.

By the Governor:
(s) James H. Duff

(s) Charles M. Morrison,
Secretary of the Commonwealth.

(Seal)

EXHIBIT 3

Western State Penitentiary
of Pennsylvania
Rockview, Pa.

Stanley P. Ashe,
Warden.

Electrocution Building

September 22, 1949

Commonwealth of Pennsylvania

vs.

James Smith

To Mr. F. S. Baldi, Superintendent Philadelphia County Prisons, County of Philadelphia and to any Warden, Prison Keeper or Officer of this

Commonwealth having the custody of James Smith, Greeting:

By virtue of a warrant issued July 20, 1949 by James H. Duff Governor of the Commonwealth of Pennsylvania, commanding me to cause one James Smith to be executed in this institution in the manner prescribed by law, I hereby notify you to forthwith deliver the said James Smith to the Electrocution Building of the Western State Penitentiary of Pennsylvania, Rockview, Center County, Pa., where He shall remain until the penalty of death has been legally inflicted or until lawfully discharged from my custody.

Stanley P. Ashe,
Warden.

By C. C. Rhoads,
Deputy Warden.

(Seal)

EXHIBIT 4

Western State Penitentiary
of Pennsylvania

Electrocution Building

Stanley P. Ashe
Warden

Rockview, Pa.

Brief Sur Petition for Leave to Intervene

State of Pennsylvania
County of Center *ss:*

Before me, a Notary Public in and for the State of Pennsylvania and County of Center, personally appeared Fred S. Baldi, Who, being duly sworn according to law deposes and says: That he is Fred S. Baldi. That he is Superintendent of Philadelphia County Prisons. That the prisoner delivered by him to the custody of the Warden of the Western State Penitentiary is James Smith, and that ~~he~~, Fred S. Baldi is duly authorized by law to deliver the said James Smith to the custody of the Warden of the Western State Penitentiary.

Fred Baldi (Illegible)
Superintendent of Philadelphia County Prisons.

Sworn and subscribed to before me this 24 day of September, 1949.

E. T. Haynes,
Notary Public.

(Seal).

My Commission Expires January 17, 1953.

EXHIBIT 5

Western State Penitentiary of Pennsylvania
Electrocution Building

Rockview, Pa., September 24, 1949

No. 401

Received from Fred S. Baldi, Superintendent of Prisons of the County of Philadelphia, Prisoner James Smith. Plead Guilty to the crime of murder of the first degree and sentenced to be executed in the Electrocution Building of the Western State Penitentiary of Pennsylvania.

Stanley P. Ashe,
Warden.

By C. C. Rhoads,
Deputy Warden.

Attest: M. M. Cobb,
Clerk.

(Seal)

I hereby certify that James Smith was received at the Electrocution Building of the Western State Penitentiary of Pennsylvania on September 24, 1949.

C. C. Rhoads,
Deputy Warden.

EXHIBIT 6

In the District Court of the United States
For the Eastern District of Penna.

M. 1334

United States ex rel. James Smith

vs.

Warden of Western State Penitentiary

Order granting petition for writ of habeas corpus staying execution of sentence of death.

Now, to wit, this twenty-fourth day of September, A. D., 1949, upon consideration of the petition of James Smith, and upon and after hearing in open court, with the Commonwealth of Pennsylvania represented by James W. Tracey, Jr., Assistant District Attorney, it is hereby ordered and decreed that a writ of habeas corpus issue directed to the Warden of Western State Penitentiary, directing that he produce the body of James Smith before the Judges of the United States District Court for the

Eastern District of Pennsylvania on Tuesday, October 4, 1949, at ten o'clock a.m., that execution of the death sentence and all other proceedings be stayed meanwhile, and that the writ of habeas corpus shall be served by counsel for above Relator.

By the Court,
(s) Geo. A. Welsh,
J.

EXHIBIT 7

In the United States District Court
For the Eastern District of Pennsylvania

M.-1334

(Filed Nov. 16, 1949)

United States ex rel. James Smith

vs.

Warden of the Philadelphia County Prison

and

Warden of the Western State Penitentiary

JUDGMENT

And now, to wit, the 16th day of November, 1949, this cause having been fully heard and determined, the writ of habeas corpus heretofore issued is discharged and the relator, James Smith, is remanded to custody.

By the Court,
(s) Kirkpatrick, *Ch. J.*

EXHIBIT 8

In the United States District Court
For the Eastern District of Pennsylvania

Misc. No. 1334

United States of America ex rel. James Smith
vs.
Warden of Western State Penitentiary

ORDER

Before Kirkpatrick, *Ch. J.*

And now, November 22nd, 1949, an appeal having been taken from the judgment of this Court dis-

charging the writ of habeas corpus heretofore issued, pending review of the decision of this Court the relator shall be detained in the custody of Robert J. Beveridge, Warden of the Philadelphia County Prison.

By the Court,
Attest:
(s) Leo A. Lilly,
Deputy Clerk.

VII.

PETITION BY THE ATTORNEY GENERAL OF PENNSYLVANIA TO CONVENE A FULL BENCH

United States District Court for the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith

vs.

Dr. Frederick S. Baldi, Superintendent, Philadelphia County Prison and J. W. Claudy, Warden of the Western State Penitentiary.

PETITION TO CONVENE A FULL BENCH

To the Honorable, the Judges of Said Court:

The petition of Dr. Frederick S. Baldi and J. W. Claudy, by Charles J. Margiotti, Attorney General of Pennsylvania, respectfully represents:

1. That they are the respondents in the above captioned proceeding.

2. That the relator who is under a sentence of death imposed by the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948, made the prior application for a writ of habeas corpus to your Honorable Court at No. M. 1334 upon which a writ of habeas corpus was issued and the execution stayed.

3. That the proceedings at No. M. 1334 were heard and determined by a full bench composed of all the District Judges of the Eastern District of Pennsylvania.

4. That following the proceedings at No. M. 1334 dismissing the writ which was affirmed by the United States Court of Appeals for the Third Circuit at No. 10141, habeas corpus proceedings challenging the validity of the judgment of the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948, were instituted in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 on the identical grounds alleged in the instant proceeding.

5. That the Supreme Court of Pennsylvania, after careful consideration of the relator's allegations dismissed the petition, opinion reported at 364 Pa. 93, 71 A. 2d 107.

6. That the relator then applied to the Supreme Court of the United States at No. 70 October Term,

1950 for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302.

7. That on Monday, October 9, 1950, the Supreme Court of the United States denied relator's application for a writ of certiorari to the Supreme Court of Pennsylvania, whereupon he immediately made an application to your Honorable Court on the identical grounds alleged in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302, for a writ of habeas corpus.

8. That Honorable George A. Welsh, District Judge, on the same day, to wit, the 9th day of October, 1950, issued a rule to show cause why a writ should not issue, said rule being returnable before your Honorable Court on Wednesday, October 18, 1950, at 10:00 a.m.

9. That the petitioners verily believe that the fundamental issue involved in this proceeding, namely, whether, in the circumstances, an application for a writ of habeas corpus should be entertained by the District Court warrants the consideration of all the members of your Honorable Court.

Wherefore, the petitioners pray your Honorable Court to convene a court composed of all the members of the District Court for the Eastern District of Pennsylvania or, in the alternative, so many of them as your Honorable Court may feel the situa-

tion warrants and demands. And they will ever pray, etc.

(s) CHARLES J. MARGIOTTI,
Attorney General of Pennsylvania,
By: (s) RANDOLPH C. RYDER,
Deputy Attorney General.

Commonwealth of Pennsylvania,
County of Dauphin ss:

Before me, a Notary Public in and for said State and county, personally appeared Randolph C. Ryder, Deputy Attorney General of Pennsylvania, who being duly sworn according to law, deposes and says that the foregoing facts are true and correct to the best of his knowledge, information and belief.

(s) RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

(Jurat)

VIII.

ANSWER TO PETITION TO CONVENE A FULL BENCH

In the United States District Court for the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith

v.

Dr. Frederick S. Baldi, Superintendent, Philadelphia County Prison

ANSWER TO PETITION TO CONVENE A FULL BENCH

To the Honorable, the Judges of Said Court:

The Answer of James Smith, Relator, by his attorney, Thomas D. McBride, respectfully represents:

1. It is admitted that Dr. Baldi is a Respondent but it is denied that J. W. Claudy is a Respondent or has officially or personally any rights appertaining to this case.

2. Admitted.

3. Denied as averred. All of the testimony and other evidence was heard by and before Honorable George A. Welsh only.

4. It is admitted that the proceedings were instituted. It is denied that the grounds were identical. On the contrary it is averred that the petition filed in the Supreme Court of Pennsylvania raised additional grounds, including grounds pertaining to the fact that Relator was deprived of the effective assistance of counsel at his arraignment and grounds pertaining to the alteration by some one of the endorsements on the bill of indictment on which Relator had been tried.

5. It is admitted that the petition was dismissed. Relator has no knowledge as to whether "careful consideration" was given to Relator's allegations. It is alleged that the Supreme Court of Pennsylvania unwarrantedly acted on the basis of a copy of the notes of testimony taken in this United States District Court, picking and choosing therefrom matters purporting to support the decisions of the Supreme Court of Pennsylvania. There have been no findings of fact as to any disputed issue in this case by any competent tribunal.

6. Admitted.

7. Admitted.

8. Admitted.

9. Denied. On the contrary it is averred that there is nothing involved in this case which makes the case one which cannot be disposed of by a single judge, like any other case before this Court. There are disputed issues of fact which must be heard and resolved before the questions of law can be decided unless the averments of Relator's petition are deemed to be fully admitted. Relator does not know of any precedent for disposing of such issues by a full bench which is usually convened only for the disposition of questions of law.

Wherefore, Relator prays your Honorable Court not to grant the prayer of the petition.

JAMES SMITH,
By THOMAS D. McBRIDE.

Commonwealth of Pennsylvania,
County of Philadelphia ss:

Thomas D. McBride, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct.

(s) THOMAS D. McBRIDE.

Sworn to and subscribed before me this 26th day of October, A. D. 1950.

Martha A. Rau,
Notary Public.

My commission expires January 7, 1951.
(Seal)

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IN THE

Supreme Court of the United States

October Term, 1952

No. 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,
Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit.

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General,
RANDOLPH C. RYDER,
Deputy Attorney General,
ROBERT E. WOODSIDE,
Attorney General.

State Capitol,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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ADDITIONAL QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause (Article IV, Section 1) of the Federal Constitution and the legislation pursuant thereto (Section 1738, the Revised Judicial Code) does not require Federal courts, on an application for a writ of habeas corpus by a person in custody pursuant to a State criminal judgment, to accord the unreversed judgments of the State courts in direct and collateral proceedings the same force and effect which they have by law and usage in the State court?

2. Whether a habeas corpus proceeding in the Federal courts in which the constitutional validity of a State criminal judgment is assailed is not a suit against the State which, in the absence of consent by the State, is not within the judicial power of the United States?

STATEMENT

This supplemental brief is submitted, at the request of the Court, in support of the argument made by counsel for the respondents at oral argument on October 14, 1952.

ARGUMENT

The Judgments of the Supreme Court of Pennsylvania Were Entitled to the Same Force and Effect in the Federal Courts Which They Receive in the State Courts

The District Court was absolutely right in according the judgments of the Supreme Court of Pennsylvania in the appeal and collateral habeas corpus proceedings the force and effect which it did. It has long since been settled that the Full Faith and Credit clause of the Federal Constitution (Article IV, Section 1) and legislation enacted by Congress pursuant thereto (Section 1738, the Revised Judicial Code) **requires** the Federal courts to accord judicial proceedings of a State court drawn into question in an independent proceeding in the Federal courts, the same force and effect which they have by law or usage in the State courts.[1] The doctrine

[1] American Surety Co. v. Baldwin, 287 U.S. 156, 166-167; Sanders v. Fertilizer Works, 292 U.S. 190, 206 (Mr. Justice Cardozo, dissenting); Cf., Angel v. Bullington, 330 U.S. 183, 187.

is applicable to a habeas corpus proceeding in the Federal courts based on an asserted constitutional invalidity of a State criminal judgment.[2] The Federal issues presented to the District Court were clearly adjudicated by the Supreme Court of Pennsylvania in the collateral habeas corpus proceeding,[3] and could not be relitigated in the Pennsylvania courts.[4] The District Court, regardless of its views concerning the propriety or impropriety of the decision, was under a **duty** to give the unreversed judgment of the Supreme Court of Pennsylvania the same

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[2] Frank v. Mangum, 237 U.S. 309, 333-334.

[3] The petition filed in the District Court was "a carbon copy" of the petition for a writ of habeas corpus filed in the Supreme Court of Pennsylvania. Cf., Angel v. Bullington, 330 U.S. 183, 186.

[4] Commonwealth ex rel. Banks v. Claudy, 370 Pa. 190, 88 A. 2d 53; Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 340, 19 A. 2d 464; Commonwealth ex rel. Dugan v. Ashe, 347 Pa. 588, 589, 33 A. 2d 32; Commonwealth ex rel. Orlando v. Smith, 346 Pa. 42, 30 A. 2d 534; Commonwealth ex rel. Lewis v. Ashe, 142 Pa. Superior Ct. 357, 358, 16 A. 2d 433; Commonwealth ex rel. Foster v. Ashe, 146 Pa. Superior Ct. 482, 488, 23 A. 2d 245; Commonwealth ex rel. Jackowski v. Fluck, 147 Pa. Superior Ct. 434, 438-439, 24 A. 2d 729; Commonwealth ex rel. Maurice v. Smith, 150 Pa. Superior Ct. 455, 28 A. 2d 811; Commonwealth ex rel. Lieberman v. Burke, 158 Pa. Superior Ct. 207, 208, 44 A. 2d 597; Commonwealth ex rel. Simpson v. Burke, 171 Pa. Superior Ct. 527, 529, 89 A. 2d 898.

force and effect it had in the Pennsylvania courts.[5] **This it did.** The court of appeals, therefore, erred in concluding that the District Court had a duty to inquire into the application on the merits.

[5] Angel v. Bullington, 330 U.S. 183, 187; See also Rooker v. Fidelity Trust Co., 263 U.S. 413; 415; Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 412 (Mr. Justice Brandeis, dissenting).

The District Court Did Not Have Jurisdiction

It has long since been settled by this court that the judicial power of the United States does **not** extend to suits against a State by a citizen or resident thereof in the absence of the State's consent.[6] That issue—jurisdiction—may be raised in this court for the first time.[7]

A habeas corpus proceeding is a "suit"[8] involving a "collateral attack on the judgment forming the basis of detention".[9] The criminal judgment was rendered in an action by and in

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[6] Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22; Palmer v. Ohio, 248 U.S. 32; Duhne v. New Jersey, 251 U.S. 311; See also Great Northern Ins. Co. v. Read, 322 U.S. 47, 51; Ford Co. v. Dept. of Treasury, 323 U.S. 459, 464.

[7] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 467. See also M. C. & L. M. Railway Co. v. Swan, 111 U.S. 379, 382; Kentucky v. Powers, 201 U.S. 1, 35; Ex parte McCardle, 73 U.S. (6 Wall.) 318, 327.

[8] Darr v. Burford, 339 U.S. 200, 207; Ex parte Quirin, 317 U.S. 1, 24; Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 564, 567, 597; Bryant v. Zimmerman, 278 U.S. 63, 70; Ex parte Milligan, 71 U.S. (4 Wall.) 2, 112.

[9] Goto v. Lane, 265 U.S. 393, 401.

the name of the State[10] and against the petitioner for the redress of an injury to the public[11], whom the State, in its artificial capacity, represents.[12] The State, and very properly so, has been recognized by this Court as the **real party in interest** in a collateral attack on a State criminal judgment.[13] Indeed, Section 2252 of the Revised Judicial Code[14] clearly recognizes such a proceeding to be a **suit against the State.** More-

---

[10] "* * * All prosecutions shall be carried on *in the name and by the authority of the Commonwealth of Pennsylvania*, and conclude 'against the peace and dignity of the same'." Article 5, Section 23, Constitution of Pennsylvania. (Emphasis supplied)

See also Harger v. Thomas, 44 Pa. 128, 130; Commonwealth v. Neuman, 151 Pa. Superior Ct. 642, 649, 30 A. 2d 698; Commonwealth v. Shimpeno, 160 Pa. Superior Ct. 104, 114; 50 A. 2d 39.

[11] Commonwealth v. Shimpeno, ibid.

[12] 1 Bl. Comm., p. 268; 4 Bl. Comm., p. 2.

[13] Knewel v. Egan, 268 U.S. 442, 448; Cf., Collins v. Miller, 252 U.S. 364, 371; Ornelas v. Ruiz, 161 U.S. 502, 507.

[14] §2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct." 28 U.S.C. 2252.

over, if this Court may, as has been intimated,[15] exercise **original** jurisdiction in this class of case, pursuant to the authority conferred by Section 2241 of the Code,[16] they may **only** do so because the State is a party,[17] since Congress may not constitutionally confer any original jurisdiction upon this Court except in cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party". (Article III, Section 2, Cl. 2)[18] It is manifest, therefore, that this proceeding is essentially and fundamentally a suit against the State.

Is it material that ministerial officers, who are required by the law of the State to carry into execution the criminal judgment, are the nom-

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[15] See Darr v. Burford, 339 U.S. 200, 204; Mooney v. Holohan, 294 U.S. 103, 115; Whitten v. Tomlinson, 160 U.S. 231, 239, 240; In re Lincoln, 202 U.S. 178, 180; Cf. Ex parte Mirzan, 119 U.S. 585; Wildenhus's Case, 120 U.S. 1, 11; Ex parte McCardle, 73 U.S. (6 Wall.) 318, 325-326; Matter of Gregory, 219 U.S. 210; Ex parte Terry, 128 U.S. 289, 301; Storti v. Massachusetts, 183 U.S. 138, 143; Ex parte Hudgings, 249 U.S. 378; Ex parte Tracy, 249 U.S. 551.

[16] This Court's power to issue writs of habeas corpus is entirely statutory. Ex parte Bollman, 8 U.S. (4 Cr.) 75, 94.

[17] See, Ex parte Hung Hang, 108 U.S. 552, 553.

[18] Marbury v. Madison, 5 U.S. (1 Cr.) 137; Ex parte Yerger, 75 U.S. (8 Wall.) 85, 98.

inal defendants? The answer to this question is clearly NO.[19] If the relief requested is compulsion against the sovereign, although nominally directed to the officer, the suit is barred "because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction".[20] The relief sought by the petitioner is undeniably compulsion against the State since the State, representing the public,[21] is **not** the nominal defendant [respondent] but the **real party in interest,** and, by necessity, the party against whom the requested relief would essentially operate.[22] Moreover,

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[19] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 687-688.

[20] Id., at p. 688.

[21] See cases cited footnote 13, supra.

[22] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110; Louisiana v. Jumel, 107 U.S. 711; Hagood v. Southern, 117 U.S. 52; In re Ayers, 123 U.S. 443; Christian v. Atlantic & N. C. Railroad, 133 U.S. 233; Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22; Belknap v. Schild, 161 U.S. 10; Harkrader v. Wadley, 172 U.S. 148; Fitts v. McGhee, 172 U.S. 516; Minnesota v. Hitchcock, 185 U.S. 373, 387-388; Chandler v. Dix, 194 U.S. 590; Oregon v. Hitchcock, 202 U.S. 60; Louisiana v. Garfield, 211 U.S. 70; Murray v. Wilson Distilling Co., 213 U.S. 151; Goldberg v. Daniels, 231 U.S. 218; Wells v. Roper, 246 U.S. 335; Ex parte State of New York (No. 1), 256 U.S. 490; Morrison v. New Work, 266 U.S. 481; Highway Comm. v. Utah Co., 278 U.S. 194; Missouri v. Fiske, 290 U.S. 18; Larson v. Domestic & Foreign Corp., 337 U.S. 682.

and this is one of the tests,[23] the respondents would incur **no** personal liability by relying on the unreversed criminal judgment[24]—a rule of practical necessity, for, otherwise, the enforcement of criminal judgments would be fraught with insurmountable difficulties—and, hence, this case does not fall within the class of decisions where that factor was the ratio decidendi[25]. Nor can it be properly catalogued in that class of cases where the fundamental ratio decidendi was that the denial of relief in the Federal courts would very likely, as a practical matter, result in **no** relief, since the States could close the doors to State judicial relief,[26] for the States **must** provide corrective

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[23] Tennessee Power Co. v. T. V. A., 306 U.S. 118, 137-138; Chandler v. Dix, 194 U.S. 590; In re Ayers, 123 U.S. 443, 500-501; Poindexter v. Greenhow, 114 U.S. 270, 288; U. S. v. Lee, 106 U.S. 196, 219.

[24] Thompson v. Lyle, 3 W. & S. (Pa.) 166; Cf., Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613; Haffin v. Mason, 82 U.S. (15 Wall.) 671, 675; Taylor v. McGrath, D. C. Cir., 194 F. 2d 883; Laughlin v. Rosenman, D. C. Cir., 163 F. 2d 838.

[25] See cases collected in Class II of Mr. Justice Frankfurter's dissenting opinion in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 731-732.

[26] General Oil Co. v. Crain, 809 U.S. 211, 226-227; Poindexter v. Greenhow, 114 U.S. 270; Chaffin v. Taylor, 114 U.S. 309; Herndon v. Chicago R. I. & Pac. R. Co., 218 U.S. 135; Hanley v. Schwalby, 147 U.S. 508, 518.

process for relief from constitutionally invalid criminal judgments.[27] If they do not, relief may be secured in the Federal courts,[28] and properly so, for by **failing to provide corrective process,** the State may and should be regarded as having waived its immunity to suit.[29]

The Constitution of Pennsylvania prohibits the suspension of the writ of habeas corpus "unless when in case of rebellion or invasion the public safety may require it".[30] The right to the writ may not be so hampered by the legislature as to amount to a deprivation of it.[31] Habeas corpus, in Pennsylvania, is undeniably an adequate remedy to collaterally challenge the constitution-

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[27] Mooney v. Holohan, 294 U.S. 103; Moore v. Dempsey, 261 U.S. 86; Foster v. Illinois, 332 U.S. 134, 139; Hedgebeth v. North Carolina, 334 U.S. 806, 807; Jennings v. Illinois, 342 U.S. 104, 111.

[28] Jennings v. Illinois, ibid.

[29] Cf., Jennings v. Illinois, 342 U.S. 104, supra.

[30] Article I, Section 14, Constitution of Pennsylvania. Identical provisions were contained in Article 9, Section 14 of the Constitutions of 1790 and 1838. Indeed, the judges of the Supreme Court of Pennsylvania and the Courts of Common Pleas were authorized to issue writs of habeas corpus in 1785 (See Act of February 18, 1785, 2 Sm. L. 275, 12 Purdon's Penna. Statutes Annotated, 1871 et seq. which has been continuously effective since that date).

[31] Commonwealth ex rel. Greevy v. Reifsteck, 271 Pa. 441, 445, 115 Atl. 130.

al validity of a criminal judgment.[32] The Supreme Court of Pennsylvania is specifically authorized by the organic law[33] to issue writs of habeas corpus. Since that Court has all the powers of the Court of Kings Bench,[34] it would, apart from specific constitutional authorization, have that power anyhow. Therefore, since the present provision of the organic law remains operative, the writ of habeas corpus will be available in Pennsylvania, subject to the general exceptions that it may not be used as a substitute for an appeal[35] or be abused[36] to test the validity of the basis of detention. If Pennsylvania courts refused relief improperly, this Court may then exercise the appellate jurisdiction conferred

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[32] Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A. 2d 167, c. d. 340 U.S. 812; Commonwealth ex rel. Sheeler v. Burke, 367 Pa. 152, 79 A. 2d 654; Commonwealth ex rel. Darcy v. Claudy, 367 Pa. 130, 79 A. 2d 585, c. d. 342 U.S. 837; Commonwealth ex rel. Daverse v. Hohn, Pa. , A. 2d , c. d. 342 U.S. 812 (not reported); Commonwealth ex rel. Thompson v. Dye, Pa. , A. 2d , c. d. 342 U.S. 929 (not reported).

[33] Article 5, Section 3, Constitution of Pennsylvania.

[34] Commonwealth v. Ragone, 317 Pa. 113, 127, 176 Atl. 454.

[35] Commonwealth ex rel. Greevy v. Reifsteck, 271 Pa. 441, 444, 115 A. 130; Commonwealth ex rel. Sullivan v. Ashe, 325 Pa. 305, 310, 188 Atl. 841; Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 340, 19 A. 2d 464.

[36] See cases cited footnote 4, supra.

by Congress and reverse.[37] Surely, in these processes there is adequate protection to the individual from a constitutional invalid criminal judgment. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harvard Law Review, 49, 91-92.

Was Pennsylvania's ratification of the Fourteenth Amendment[38] a consent to suit? This Court has held that the requisite consent **cannot** be derived from the **Constitution or laws** of the United States.[39] Moreover, Article XIV, Section 5 authorizes Congress to enact **only** such corrective legislation "as may be necessary **and** proper for counteracting . . . such acts and proceed-

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[37] Palmer v. Ashe, 342 U.S. 134.

[38] "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Article XIV, Section 5, Constitution of the United States.

[39] "The right of individuals to sue a State, in either a federal or a state court, *cannot be derived from the Constitution or laws of the United States.* It can come *only from the consent of the State.*" Palmer v. Ohio, 248 U.S. 32, 34. (Emphasis supplied)

Duhne v. New Jersey, 251 U.S. 311, held that Article III, Section 2, Cl. 2, conferring original jurisdiction upon this Court in all cases "in which a State shall be Party" did not operate as consent to suit.

Williams v. United States, 289 U.S. 553, 573 held that Art. III, Section 2, Cl. 1 extending the judicial power of the United States "to Controversies to which the United States shall be a Party", did not operate as consent to suit.

ings as the States may commit or take, and which by the amendment, they are prohibited from committing or taking'"[40] While Congress, undoubtedly, is the judge of what is "necessary", **propriety** is a judicial matter.[41] In making that evaluation not only should other provisions of the Constitution be considered,[42] but also the consequences upon the administration of criminal justice in the States.[43] If these pre-

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[40] Civil Rights Cases, 109 U.S. 3, 13-14; See also, Collins v. Hardyman, 341 U.S. 651, 659; U. S. v. Reese, 92 U.S. 214; U. S. v. Cruikshank, 92 U.S. 542.

[41] Ibid.

[42] Ibid.

[43] "*Resolution on Habeas Corpus Adopted by the Conference of Chief Justices at Its Fourth Annual Meeting, September* 11-14, 1952.

"Whereas it appears that by reason of certain principles enunciated in certain recent federal decisions, a person whose conviction in a criminal proceeding in a State Court has thereafter been affirmed by the highest court of that State, and whose petition for a review of the State Court's proceedings has been denied by the Supreme Court of the United States, may nevertheless obtain from a Federal district judge or Court, under a writ of habeas corpus, new, independent, and successive hearings based upon a petition supported only by the oath of the petitioner and containing only such statement of facts as were, or could have been, presented in the original proceedings in the State Courts:

"And whereas the multiplicity of these procedures available in the inferior Federal Courts to such convicted persons, and the consequent inordinate delays in the enforce-

cepts are adopted, it is fairly obvious that Congress has exceeded the constitutional grant of power for (1) the jurisdiction conferred is in excess of the judicial power of the United States and (2) it is resulting in unseemly conflicts[44] between the State and Federal courts as well as

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ment of criminal justice as the result of said Federal decisions will tend toward the dilution of the judicial sense of responsibility, may create grave and undesirable conflicts between Federal and State laws respecting fair trial and due process, and must inevitably lead to the impairment of the public confidence in our judicial institutions;

"Now therefore be it resolved that it is the considered view of the Chief Justices of the States of the Union, in conference duly assembled, that orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court be subject to review or reversal only by the Supreme Court of the United States;

"Be it further resolved that the Chairman of the Conference of Chief Justices be authorized, and he is hereby directed, to appoint a special committee to give study to the grave questions and potential complications likely to ensue if the power to review or void state court judgments continues to be recognized as lying in any courts of the Federal judicial system, save and except the Supreme Court of the United States; and that said special committee report its findings and recommendations at the next regular meeting of the Conference."

[44] Ibid.; Cf., Almeida v. Baldi, 104 F. Supp. 321, aff'd 195 F. 2d 815, Petition for Certiorari pending at No. 264 October Term, 1952.

inordinate delay in prompt punishment[45] which delay is undesirable[46] and subjects State judges,[47]

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[45] The procedure of this very case seems to have become standard practice in capital cases in Pennsylvania. See Darcy v. Handy, 97 F. Supp. 930 (pending on appeal) (ineffective assistance of counsel); Daverse v. Hohn, 101 F. Supp. 17, aff'd September 17, 1952, No. 10656, 3 Cir. F. 2d (prejudiced juror); Thompson v. Dye, 103 F. Supp. 776 (pending on appeal) (ineffective assistance of counsel); Almeida v. Baldi, 104 F. Supp. 321, aff'd 195 F. Supp. 815, Petition for Certiorari at No. 264 October Term, 1952 pending (suppression of evidence which the State courts held was immaterial). The crime for which the petitioner was convicted was committed nearly five years ago. The orderly course of justice was interrupted by the federal courts three years ago.

[46] "The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are 'true to the best of his knowledge and belief,' thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences." Moore v. Dempsey, 261 U.S. 86, 93 (Mr. Justice McReynolds, dissenting).

[47] "A complete and exhaustive hearing was held. The petitioner was granted *unlimited* opportunity to present allegations and cross examine witnesses, including *two of the sentencing judges of Crawford County.*" Brink v. Claudy (D. C. W. D. Pa.), 96 F. Supp. 220, 221, 102 F.

juries[48] and defense counsel[49] to excoriating and often embarrassing cross examination by a convict. The respondents realize that this Court, in **Ex Parte Royall,**[50] the genesis[51] of several subsequent pronouncements and holdings,[52] held that Congress had the power to confer jurisdiction upon the United States courts to inquire into the constitutional validity of State processes pursuant to which a person was being detained.[53] That conclusion was based on three

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Supp. 802-803 (Emphasis supplied); See record in Smith v. Baldi (D. C. E. D. Pa., No. M 1334) 87 F. Supp. 339, which should be part of the record before this Court in this case.

[48] Daverse v. Hohn, 101 F. Supp. 17, aff'd, 3 Cir., No. 10,656, September 17, 1952 F. 2d

[49] Thompson v. Dye, 103 F. Supp. 776, pending on appeal.

[50] 117 U.S. 241, 248-249.

[51] The progenitor of this decision was the decision of Mr. Justice Bradley sitting as a Circuit Justice in Ex parte Bridges, Federal Cases, No. 1,862, which, paradoxically, anticipated the present dilemma.

[52] United States v. Hayman, 342 U.S. 205, 211-212; Frank v. Mangum, 237 U.S. 309, 331; Moore v. Dempsey, 261 U.S. 86.

[53] "* * * If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But as the judicial

premises, viz., (a) the judicial power of the United States extends to all cases arising under the Constitution, the laws and treaties of the United States, (b) the prohibition against the suspension of the writ of habeas corpus (Article I, Section 9, Cl. 2), (c) Congressional power to pass all laws necessary and proper to carry into execution the powers vested in the government of the United States. The first premise (a) was modified three years later[54] by excluding from the judicial power of the United States suits against States by citizens or residents thereof. The second premise (b) not only failed

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power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. * * *" Ex parte Royall, 117 U.S. 241, 249.

[54] Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22.

to observe that the prohibition against the suspension of the writ of habeas corpus was a restriction upon the national Legislature[55] but also that the term "habeas corpus", as used in Article I, Section 9, Cl. 2, was well understood[56] and did not comprehend its availability—at least so far as the States were concerned[57]—to inquire into the validity of a criminal judgment de hors the record.[58] It is submitted that **Ex Parte Royall** the progenitor of the present confusion should be overruled—now.[59]

Did the appearance of the Attorney General of Pennsylvania and the District Attorney of Philadelphia County operate as a waiver of immunity to suit? The answer to this question de-

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[55] Ex parte Merryman, Federal Cases, No. 9,487 (Taney, C.J.).

[56] Ex parte Watkins, 28 U.S. (3 Pet.) 193, 201.

[57] Section 14 of the Judiciary Act of 1789 which is evidentiary of the connotation of the term "habeas corpus" as employed in Article I, Section 9, Cl. 2 (Ex parte Bollman, 8 U.S. (4 Cr.) 75, 95) and which is "of great value in expounding the meaning of the judicial article of" the Constitution (Williams v. United States, 289 U.S. 576, 573-574) expressly prohibited the issuance of a writ on the application of a person in custody pursuant to State process. Ex parte Dorr, 44 U.S. (3 How.) 103.

[58] Ex parte Watkins, 28 U.S. (3 Pet.) 193.

[59] See Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 405-412 (Mr. Justice Brandeis, dissenting).

pends upon whether or not the State has consented to suit.[60] Article 1, Section 11 of the Constitution of Pennsylvania provides: "Suits may be brought against the Commonwealth in such manner, **in such courts** and in such cases **as the Legislature may by law direct**[61] (emphasis supplied). The Attorney General of Pennsylvania is the head of the Department of Justice.[62] He is the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth and is authorized to exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this

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[60] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 466.

[61] "Subject to the limitations arising from the federal nature of our government and the provisions of the federal Constitution the Commonwealth of Pennsylvania is a sovereign State, and, as such, it cannot be sued except with its own consent * * * That consent is conditionally provided by Article I, Section 11 of the State Constitution, which says that 'Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.' * * *" Kaufman Const. Co. v. Holcomb et al., 357 Pa. 514, 516, 55 A. 2d 534. See also, Collins v. Commonwealth, 262 Pa. 572, 575, 106 Atl. 229; Merchants' Warehouse Co. v. Gelder, 349 Pa. 1, 7, 36 A. 2d 444; Bell Telephone Co. v. Lewis et al., 313 Pa. 374, 375, 169 Atl. 571.

[62] Section 206(a), Act of April 9, 1929, P. L. 177, as amended, 71 Purdon's Penna. Statutes Annotated 66(a).

Commonwealth".[63] In addition, the Attorney General of Pennsylvania "is clothed with the powers and attributes which envelop Attorneys General at common law."[64] The Department of Justice has the power and duty "To represent the Commonwealth . . . in any litigation to which the Commonwealth . . . may be a party, or in which the Commonwealth . . . is permitted or required by law to intervene or interplead".[65] This of course, must be construed consonantly with the Constitution (Article 1, Section 11) as authorizing the Attorney General to represent the Commonwealth **only** in such courts and in such cases as the Legislature may by **law** direct". No general law authorizes the Attorney General to appear in behalf of the Commonwealth in the courts of the United States. The State, therefore, has not consented to the suit.[66] Nor do the common law powers of the Attorney General of Pennsylvania alter or modify that conclusion for the reasons that the Attorney General, at common law, did not have the power to waive the

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[63] Section 704, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 244.

[64] See Commonwealth ex rel. Minerd v. Margiotti, 325 Pa. 17, 30-31, 188 Atl. 524.

[65] Section 903, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 293.

[66] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 468-469.

sovereign's immunity to suit.[67] Even if the Attorney General, at common law, had such powers, those powers were modified by Article 1, Section 11 of the Constitution of Pennsylvania. It is clear that the District Attorney's appearance could not possibly work a different result.

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[67] This could only be done by the Crown's endorsement of a Petition of Right. United States v. Lee, 106 U.S. 196, 238; See also, 1 Daniell's Chancery Pleading & Practice (5th Ed.) p. 125; Attorney General for Ontario v. Russel, 49 Ontario L. Rep. 103, 111; Cf., Hodge et al. v. The Attorney General, 3 Y. & C. Ex. 734; Dyson v. The Attorney General (Ct. of Appeals), 27 T.L.R. 143, 144-145.

Conclusion

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,
Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit.

APPENDIX TO SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal

CONSTITUTION OF THE UNITED STATES

ARTICLE III.

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—

to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * * * *"

ARTICLE IV.

"Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Statutes and Constitutional Provisions Involved

STATUTES

The Revised Judicial Code, 28 U. S. C.

The Act of June 25, 1948, c. 646, 62 Stat. 869 et seq., 28 U. S. Code.

"§1738. State and Territorial Statutes and judicial proceedings; full faith and credit.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Pos-

sessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

"§ 2252. Notice.

"Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

Pennsylvania

CONSTITUTION OF PENNSYLVANIA

ARTICLE 1

"Section 11. Courts to be open; suits against Commonwealth.

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in

such courts and in such cases as the Legislature may by law direct."

"Section 14. Prisoners to be bailable; habeas corpus.

All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."

ARTICLE 5

"Section 3. Jurisdiction of Supreme Court.

The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases in injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State,

but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law."

STATUTES

Act of June 19, 1913, P. L. 528, 19 Purdon's Pennsylvania Statutes Annotated, 1121-1129.

"An Act Fixing the penalty for murder of the first degree; regulating the procedure incident to the infliction thereof; prescribing and providing for a place and manner of inflicting said penalty on the grounds of the new Western Penitentiary of this Commonwealth, in Centre County; making an appropriation therefor; repealing inconsistent legislation; and providing that neither this act nor said repeal shall apply to any case in which it shall appear that said crime was committed prior to the date of the approval of this act.

"Section 1. Be it enacted, &c., That every person, his aiders, abettors and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in

the manner herein provided, and not otherwise. Such punishment in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the new Western Penitentiary are to be built.

"Section 2. Whenever any person shall have been convicted and sentenced to death, the clerk of the court where such conviction shall have taken place shall transmit to the Governor of the Commonwealth a full and complete transcript of the record of such trial and conviction, within thirty days after sentence, or, in the event of an appeal, within twenty days after the final disposal of the cause upon such appeal.

"Section 3. After the receipt of the said record the Governor of the Commonwealth shall issue his warrant, directed to the Warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said peni-

tentiary, within the week to be named in said warrant, and in the manner prescribed by law.

"Section 4. Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary. During such confinement no person except the officers of such penitentiary, the counsel of such convict, and a spiritual adviser selected by such convict, or the members of the immediate family of such convict, shall be allowed access to such convict without an order of said court or a judge thereof.

"Section 5. No person except the following shall witness any execution under the provisions of this act, the warden of the penitentiary where such execution takes place, a qualified physician, six reputable adult citizens selected by such warden, one spiritual adviser, when requested and selected by the convict, not more than six duly accredited representatives of the daily news-

papers, and such officers of said penitentiary as may be selected by said warden.

"Section 6. After any such execution the warden of the Western Penitentiary shall certify in writing, under oath or affirmation, to the court of oyer and terminer of the county wherein such convict has been sentenced to death, that such convict was duly executed at the place and in the manner prescribed in this act, and at the time designated in the death warrant of the Governor. Such certificate shall be filed in the office of the clerk of such court.

"Section 7. Immediately after execution, a post-mortem examination of the body of the convict shall be made by the physician present at the execution, and his report, in writing, stating the nature of the examination so made by him, shall be annexed to the certificate hereinbefore named, and filed therewith. After such post-mortem examination the body, unless claimed by some relative or relatives of the person so executed, shall be delivered to the duly authorized agent of the State Anatomical Board.

"Section 8. The cost and expense incident to any such execution and such post-mortem examination shall be paid from the contingent fund of the Western Penitentiary.

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"Section 11. All acts or parts of acts inconsistent herewith are hereby repealed: Provided, however, That neither the provisions of this act nor the repeal above mentioned shall apply to any case in which it shall appear that the said crime was committed prior to the date of the approval of this act.

Section 12. This act is intended to furnish a comprehensive and complete method of inflicting the death penalty. If any portion of this act shall be declared invalid or unconstitutional by the Supreme Court of Pennsylvania, the entire act shall thereupon be null and void."

THE ADMINISTRATIVE CODE

Act of April 9, 1929, P. L. 177, as amended, 71 Purdon's Pennsylvania Statutes Annotated, 1 et seq.

"Section 206. Department Heads.

"Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the

powers and perform the duties by law vested in and imposed upon the department.

"(a) The following officers shall be the heads of the administrative departments following their respective titles:

* * * * * * *

"Attorney General, of the Department of Justice;" (As amended, 19 Purdon's Pennsylvania Statutes Annotated 66)

'Section 704. Attorney General.

"The Attorney General shall be the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth.

"He shall exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this Commonwealth." (19 Purdon's Pennsylvania Statutes Annotated 244)

"Section 901. Powers and duties in general.

"The Department of Justice shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the Attorney General, the Attorney General's De-

partment and the Department of Justice." (19 Purdon's Pennsylvania Statutes Annotated 291)

"Section 902. Legal advice.

"The Department of Justice shall have the power, and its duty shall be;

"(a) To furnish legal advice to the Governor, and to all administrative departments, boards, commissions, and officers of the State Government, concerning any matter or thing arising in connection with the exercise of the official powers or the performance of the official duties of the Governor, or such administrative departments, boards, commissions, or officers;

"(b) To supervise, direct and control all of the legal business of every administrative department, board, and commission of the State Government." (19 Purdon's Pennsylvania Statutes Annotated 292)

"Section 903. Litigation.

"The Department of Justice shall have the power, and its duty shall be:

"(a) To collect, by suit or otherwise, all debts, taxes, and accounts, due the Commonwealth, which shall be placed with the de-

partment for collection by any department, board, or commission. The department shall keep a proper docket or dockets, duly indexed, in which it shall make and preserve memoranda of all such claims, showing whether they are in litigation and their nature and condition;

"(b) To represent the Commonwealth, or any department, board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead." (19 Purdon's Statutes Annotated 293)

Act of May 3, 1850, P. L. 654, 16 Purdon's Pennsylvania Statutes Annotated 3431

"An Act Providing for the election of District Attorneys.

"Section 1. Duties; entry of nolle prosequi.

"The officer so elected shall sign all bills of indictment, and conduct in court all criminal and other prosecutions in the name of the common-

wealth, or when the state is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorney generals, and receive the same fees or emoluments of office: Provided, Said district attorney shall in no case whatever have authority to enter nolle prosequi in any criminal case, either before or after bill found, or to discharge a prisoner from custody, without first having obtained the approbation of the court in writing."